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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1252~~. 812 488 197

THE ARKANSAS VALLEY SMELTING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE BELDEN MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED DECEMBER 29, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1252.

THE ARKANSAS VALLEY SMELTING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE BELDEN MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered, that heretofore and on, to wit, the 27th day of March, A. D. 1883, came The Arkansas Valley Smelting Company, by Charles H. Wenzell, Esq., its attorney, and filed in said court its complaint, and sued out of said court a writ of summons against the Belden Mining Company.

And the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, } ss.
District of Colorado. }

In the United States Circuit Court in and for the State of Colorado.

THE ARKANSAS VALLEY SMELTING COMPANY, a Corporation, Plaintiff,
vs.
THE BELDEN MINING COMPANY, a Corporation.

The plaintiff complains and alleges:

1. That the amount in controversy in this action exceeds the sum of five hundred dollars, exclusive of costs.

2 2. That plaintiff is a corporation, organized and created under and by virtue of the laws of the State of Missouri, for the purpose of buying, selling, sampling, reducing and smelting ores, and doing business in the State of Colorado by virtue of a compliance with the laws thereof.

3. That defendant is a corporation organized and created under the laws of the State of Maine, for the purpose of mining for ores and doing business in the State of Colorado, by complying with the laws thereof.

4. That the defendant company is, and at the time of the entering into by it of the matters and things hereinafter stated and set forth was, the owner of a certain group of mines in the Battle Mountain Mining District, county of Summit (now ———), and State of Colorado, and was and is engaged in mining and operating the same.

5. That before and during the month of July, A. D. 1881, one C. H. Thompson was the general manager and representative of the said defendant company, having charge of said mines, working and operating the same, and having charge and disposal of any and all ores belonging to the said defendant.

6. That on, to wit, the 12th day of July, A. D. 1881, at Leadville, in the county of Lake, and State of Colorado, the defendant company, by and through the said C. H. Thompson, general manager and agent of and for said defendant, made and entered into a certain contract in writing, with Billing and Eilers, the predecessors and assignors of this plaintiff, by virtue whereof the defend-

3 ant then and there agreed and contracted with the said Billing and Eilers, plaintiff's assignors, to sell them ten thousand tons of carbonate lead ore, and that said Billing and Eilers in consideration of said sale, then and there agreed to pay the defendant

for the said ores so sold, the following price, viz., upon the basis hereinafter mentioned by the closing New York quotations, for silver and common lead, on the day of delivery of sample bottle. For the lead contained in said ore when common lead sells in New York

For	$4\frac{1}{4}$	cts. or less per pound				25	cts. per	unit.
Over	$4\frac{1}{4}$	cts. to $4\frac{1}{2}$ cts. per	"			30	" "	"
"	$4\frac{1}{2}$	" to $4\frac{3}{4}$ "	"	"		35	" "	"
"	$4\frac{3}{4}$	" to 5 "	"	"		40	" "	"
"	5	cts. per pound				45	" "	"

And for the silver contained in said ores, five (5) per cent less than New York quotations, after deducting from such prices for working charges, $10.00 per ton of ore, when ore contains no more silica than iron.

$11.00	per ton of ore, when ore contains		5%	more	silica	than	iron.
$11.50	"	"	"	"	10%	"	"
$12.00	"	"	"	"	15%	"	"
$12.50	"	"	"	"	20%	"	"

And the defendant did then and there further agree, in consideration thereof, to deliver said ore at the smelting works of the plaintiff's assignors, said Billing and Eilers, in Leadville, Lake county, Colorado, at its own cost and expense, the delivery of said
4 ore to commence as soon as the railroad from Leadville to Red Cliff, Summit county, was completed; and thereupon said defendant agreed to deliver to the said Billing & Eilers fifty (50) tons of ore a day, or at its option, any greater number of tons per day. That said railroad was completed on or about the first day of January, A. D. 1882.

7. And plaintiff further alleges that under and by virtue of said contract the defendant, at the completion of the said railroad aforesaid, at once began to ship ores to the said Billing and Eilers, plaintiff's predecessors and assignors, at their smelting works, in the county of Lake, and State of Colorado, and shipped one hundred and seventy-six and $\frac{72}{100}$ tons, to the said Billing and Eilers.

8. That on or about January 1, A. D. 1882, the said firm of Billing & Eilers was dissolved, and the said contract and the business of said firm was transferred, sold, and assigned to G. Billing, and that said defendant continued shipping ores under said contract to the said G. Billing, the successor of the said firm of Billing & Eilers, and shipped to said G. Billing eight hundred and ninety-four $\frac{37}{100}$ tons of ore, making a total on one thousand and seventy one $\frac{19}{100}$ tons of ore delivered under said contract, of the value under said contract of, to wit, thirteen thousand dollars. That all of said ore was delivered between the 12th day of December, A. D. 1881,
5 and the 12th day of February, A. D. 1882, and paid for.

9. That defendant failed to ship any ore after said 12th day of February, A. D. 1882, as it ceased mining and operating its said mines, for reasons arising out of complications in its affairs.

10. That on or about the first day of May, A. D. 1882, the said contract of defendant, was for valuable considerations assigned, sold,

and transferred by the said G. Billing, successor and assignee of the firm of Billing & Eilers, to the Arkansas Valley Smelting Company, the plaintiff herein and successor of the said G. Billing.

11. That on, to wit, the 1st day of November, A. D. 1882, the defendant refused and declined to recognize or perform its said contract, so held by plaintiffs, and notified the plaintiff that it should thereafter consider the said contract cancelled and annulled.

12. That in consequence of the failure and refusal of the defendant to fulfil and perform said said contract, the plaintiff has been damaged in the sum of one hundred thousand dollars.

Wherefore, plaintiff prays judgment for the sum of one hundred thousand dollars and costs of suit.

(S'g'd) CH. H. WENZELL,
Att'y for Plaintiff.

6 STATE OF COLORADO, } ss.
County of Lake. }

Charles T. Limberg, being first duly sworn, saith that he is the agent and manager of the plaintiff above named, that he has heard read the above complaint, and knows the contents thereof, and that the same is true of his own knowledge.

(S'g'd) CHAS. LIMBERG.

Sworn and subscribed before me this 23d day of March, A. D. 1883.

[SEAL.] J. E. McGREW,
Notary Public.

Endorsed: No. 1152. Circuit Court U. S. The Arkansas Valley Smelting Company *vs.* The Belden Mining Company. Complaint Filed Mar. 27, 1883. S'g'd Edward F. Bishop, Clerk. Ch. H. Wenzell, Leadville, Colo., Att'y for Plaintiff.

And the said summons is in words and figures as follows, to wit:

Summons and Proof of Service.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, } ss.
District of Colorado. }

7 Complaint filed in the clerk's office this 27th day of March, A. D. 1883.

THE ARKANSAS VALLEY SMELTING COMPANY, a Corporation, Plaintiff,
versus
THE BELDEN MINING COMPANY, a Corporation, Defendant.

The President of the United States of America, to the above named defendant, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court by The Arkansas Valley Smelting Company, a corporation, plaintiff, against you as defendant, to recover the sum

of $100,000.00, due from you, the said defendant, to the said plaintiff, on a certain contract entered into at Leadville, county of Lake, State of Colorado, the 12th day of July, A. D. 1881, and costs of suit. As will more fully appear from the complaint filed herein, to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, the sum of $100,000.00 and costs of suit.

Witness the Honorable Morrison R. Waite, Chief Justice
8 of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 27th day of March, A. D. 1883, and of the Independence of the United States, the 107th year.

(S'g'd) EDWARD F. BISHOP, *Clerk.*
[SEAL.] By WM. E. ROGERS,
Deputy Clerk.

Proof of Service.

UNITED STATES OF AMERICA, } *ss.*
District of Colorado. }

LEADVILLE, *April, A. D.* 1883.

I hereby certify that I received the within writ on the 2nd day of April, A. D. 1883, and that I have personally served the same upon the said defendants, The Belden Mining Company, by delivering to H. E. Armitage, the general manager of the Belden Mining Company, no other officer of said company found in my district, personally, a true copy of the within writ, at the day and time as follows: As to H. E. Armitage, general manager, at Leadville, county of Lake, on the 10th day of April, A. D. 1883.

This writ therefore returned, executed as the law directs, this 11th day of April, 1883.

(S'g'd) WALTER A. SMITH, *Marshal.*
By DAVID A. COWELL,
Deputy Marshal.

Endorsed: Gen. No. 1152. Circuit court of the United
9 States, for the district of Colorado. The Arkansas Valley Smelting Co., plaintiff, *versus* The Belden Mining Company, defendant. Summons. Filed this 11th day of Ap'l, A. D. 1883. S'g'd Edward F. Bishop, clerk, by Wm. E. Rogers, deputy clerk. Chas. H. Wenzell, of Leadville, attorney for plaintiff.

And afterwards, and on, to wit, the 19th day of June, A. D. 1883, came the said defendant, by Messrs. Rogers & Cuthbert, its attor-

neys, and filed in said court and in said cause its demurrer to the complaint heretofore filed herein.

And the said demurrer is in words and figures as follows, to wit.:

Demurrer to Complaint.

UNITED STATES OF AMERICA, }
State and District of Colorado. } ss.

In the Circuit Court of the United States within and for said district.

THE ARKANSAS VALLEY SMELTING COMPANY, a Corporation, Plaintiff,
vs.
THE BELDEN MINING COMPANY, a Corporation, Defendant.

And now comes the above named defendant, by Rogers and Cuthbert, its attorneys, and demurs to the complaint filed herein,
10 and for ground of demurrer alleges:

1st. That said plaintiff has no legal capacity to sue in this action, because it appears in and by said complaint that said plaintiff is not such assignee of the contract, or of the said G. Billing, or Billing & Eilers, mentioned in said complaint, as will entitle him to sue herein. And for the reason that it appears in and by said complaint that said pretended assignment was not of such nature, or in such manner or form as will entitle plaintiff to sue herein.

2d. That the complaint herein does not state facts sufficient to constitute a cause of action.

3d. That the complaint is ambiguous, unintelligible, and uncertain in this, to wit, that said complaint does not set forth the contract therein mentioned, or the effect thereof, with such certainty as to determine the terms or obligations thereof, or so as to determine how the price or value of the ore mentioned therein was to be paid for, and that said complaint does not state in what manner plaintiff suffered the alleged damages therein mentioned; and that said complaint is ambiguous, unintelligible, and uncertain in other respects, as appears upon the face of said complaint.

(S'g'd) By ROGERS & CUTHBERT,
Att'ys for Deft.

11 Endorsed: No. 1152. U. S. circuit court. The Arkansas Valley Smelting Company *v.* The Belden Mining Company. Demurrer to complaint. Filed June 19, 1883. S'g'd Edward F. Bishop, Clerk. Rogers & Cuthbert, att'ys for deft.

And afterwards, and on, to wit, the 7th day of May, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court. Present, the Honorable Moses Hallett, district judge; the following proceeding was had and entered of record in said court and said cause, to wit:

Order. Demurrer to complaint sustained.

THE ARKANSAS VALLEY SMELTING COMPANY
vs.
THE BELDEN MINING COMPANY. } 1152.

Action on a contract.

At this day comes the said plaintiff by R. S. Morrison, its attorney, and the said defendant by H. T. Rogers, Esq., its attorney, also comes.

And the demurrer of the said defendant to the complaint herein, coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said complaint is not sufficient in law, and so the said demurrer is sustained:

12 Nevertheless, on motion of the said plaintiff, it is ordered that it have leave to amend its complaint herein, within fifteen (15) days from this day, as it shall be advised.

And afterwards, and on, to wit, the 21st day of May, A. D. 1884, came again the said plaintiff by Messrs. Markham, Patterson & Thomas, and Morrison & Wenzell, its attorneys, and filed in said court and in said cause its amendment to the complaint heretofore filed herein. And the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado.

THE ARKANSAS VALLEY SMELTING COMPANY, Plaintiff
vs.
THE BELDEN MINING COMPANY, Defendant. } No. 1152.

Complaint.

The plaintiff complains and alleges:

13 First. That the amount in controversy in this action exceeds the sum of five hundred dollars, exclusive of costs.

Second. That the plaintiff is a corporation organized under the laws of the State of Missouri, for the purpose of buying, selling, sampling, reducing, and smelting ores, doing business in the State of Colorado by virtue of a compliance with the laws thereof; and a citizen of the State of Missouri.

Third. That the defendant is a corporation organized under the laws of the State of Maine, for the purpose of mining for ores and other matters incident to such mining, doing business in the State of Colorado by virtue of a compliance with the laws thereof; and a citizen of said State of Maine.

Fourth. That on, to wit, the twelfth day of July, A. D. 1881, and before and since said date, one C. H. Thompson was the general manager and representative of the said defendant company, having

charge of its mines, working and operating of the same, and having charge and disposal of any and all ores belonging to said defendant.

Fifth. That on, to wit, the date last mentioned, at Leadville, in the county of Lake, State of Colorado, the defendant company, by and through the said C. H. Thompson, general manager and agent
14 of and for the said defendant, made and entered into a certain contract, in writing, with Billing and Eilers, the predecessors and assignors of this plaintiff, which contract is in words and figures as follows, to wit:

"Memorandum of agreement entered into at the city of Leadville, in the county of Lake, and State of Colorado, this 12th day of July, A. D. 1881, by and between the Belding Mining Company, a corporation, duly organized under the laws of the State of Maine, and after having duly complied with the laws of the State of Colorado, carrying on business within said State of Colorado, of the first part, and Billing and Eilers, of said city of Leadville, of the second part, witnesseth:

"For and in consideration of one dollar and other valuable considerations heretofore in hand, paid and rendered said first party by said second party, the receipt whereof is hereby acknowledged and confessed, said first party agrees to furnish, sell, and deliver to said second party, ten thousand (10,000) tons of carbonate lead ore, upon the terms and in the manner following: All of said ore shall be delivered by said first party to said second party at the smelting works of said second party, at said Leadville, at the expense of said first party except as hereinafter provided, and all ore so delivered shall at once, upon the delivery thereof, become the property of
15 said second party; the delivery of said ore to begin when the railroad from said Leadville to Red Cliff, Summit county, Colorado, is completed, and thereupon said first party shall deliver at least fifty (50) tons, or at its option, any greater number of tons of said ore per day, to said second party, until all of said ore shall have been delivered; but said first party also agrees to begin the delivery of said ore at any time before the completion of said railroad, at the option of said second party, and upon condition that said second party defray the extra expense of hauling from said Red Cliff to the then terminus of said railroad.

"The value of said ore and the price to be paid therefor, shall be fixed in lots of about one hundred (100) tons each, that is to say, as soon as such a lot of ore shall have been delivered to said second party it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore, shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the de-
16 livery of sample bottle, and so on until all of said ore shall have been delivered.

"Said second party shall pay said first party, at said Leadville for

each such lot of ore at once, upon the determination of its assay value, at the following prices, to wit: For the lead contained in said ore, when common lead sells in New York for $4\frac{1}{4}$ cts. or less per pound, 25 c. per unit.

Over	$4\frac{1}{4}$	cts. to	$4\frac{1}{2}$	cts. per pound	----------	30	cts.	per	unit.
"	$4\frac{1}{2}$	"	$4\frac{3}{4}$	"	"	----------	35	"	"	"
"	$4\frac{3}{4}$	"	5	"	"	----------	40	"	"	"
"	5	cts. per pound				----------	45	"	"	"

"And for the silver contained in said ore, five (5) per cent. less than New York quotations, after deducting from such prices for working charges, $10.00 per ton of ore, when ore contains no more silica than iron; $11.00 per ton of ore, when ore contains 5% more silica; $11.50 per ton of ore, when ore contains 10% more silica than *than* iron; $12.00 per ton of ore, when ore contains 15% more silica than iron; $12.50 per ton of ore, when ore contains 20% more silica than iron.

"It is further agreed, in consideration of the considerations aforesaid, that in case said first party shall at any time during the continuance of this agreement, sell the whole or any part of the excess of its output from its mines at said Red Cliff, over the amount to be furnished said party under this agreement, said second party shall have the option of purchasing the same, at the highest and best prices offered said first party therefore, by any other responsible and *bona fide* purchasers.

17 In witness whereof said first party has cause these presents to be duly executed, and said second party has signed the same at the said city of Leadville on the day and year first above written."

Which contract was duly signed, sealed, and delivered by the respective parties thereto.

Sixth. And plaintiffs further allege that the railroad mentioned in said contract was completed on or about the 30th day of November, A. D. 1881, and that thereupon the defendant began, under and in compliance with its said contract, to ship ores to the said Billing and Eilers, plaintiffs' predecessors and assignors, at their smelting works in said contract mentioned, and did ship one hundred and seventy-six $\frac{7\,2}{1\,0\,0}$ tons to the said Billing and Eilers, between said last mentioned date and the first day of January, A. D. 1882.

Seventh. That on, to wit, said first day of January, A. D. 1882, the said firm of Billing and Eilers was dissolved and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice.

Eighth. That the said defendant continued after such transfer
18 and assignment to ship ores under and in compliance with its said contract, and did, between said first day of January, A. D. 1882, and the 21st day of April, A. D. 1882, ship of such ores to the said G. Billing, successor and assignor of the said Billing and Eilers, eight hundred and ninety-four $\frac{3\,7}{1\,0\,0}$ tons of ore, making a total of one thousand and seventy-one $\frac{9}{1\,0\,0}$ tons of ore delivered at said smelting works under the said recited contract, of the value, as calculated and

paid for under the terms of said contract of, to wit, thirteen thousand dollars.

Ninth. That on or about the first day of May, A. D. 1882, the said contract of defendant was, with the said smelting works at which said ore was to be, under said contract, delivered, for good and valuable consideration, assigned, sold, and transferred by the said G. Billing, successor and assignee of the said Billing and Eilers, to the Arkansas Valley Smelting Company, the plaintiff herein and the successor of the said G. Billing, whereof the defendant had due notice.

Tenth. That on or about the 21st day of April, A. D. 1882, the defendant ceased to make any further shipments or deliveries of ore under its said contract, and on, to wit, the 1st day of Novem-
19 ber, A. D. 1882, the defendant refused and declined to recognize or perform its said contract so held by the plaintiff, and notified the plaintiff that it, the defendant, should consider the said contract cancelled and annulled.

Eleventh. That all the ore so delivered under said contract, was paid for according to the terms of said contract as delivered, that is to say, for the lead in said ores, the defendant was paid for each unit of lead in each ton of ore, twenty-five cents when the price of lead in New York was 4¼ cents per pound or less, and at higher rates when the price of lead in New York was greater than 4¼ cents per pound, as stipulated in said contract; and for the silver in said ore, defendant was paid for each ounce five per cent. less than the price of silver per ounce in New York at the time of the assay, after making the several deductions stipulated for in contract; and the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the "sample bottle," by which expression was, by the custom of the trade, intended the completion of the as-
20 say or test by which the value of the ore was definitely fixed.

Twelfth. And the plaintiff further avers that the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times sice the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to, and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time since the said contract was assigned to it, so notified the defendant.

That by means of the refusal and failure of the defendant to fulfil and perform its said contract, and to deliver the remainder of said ten thousand tons of ore, the plaintiff has been damaged in the sum of one hundred thousand dollars.

Wherefore plaintiff prays judgment for the sum of one hundred thousand dollars and for costs of suit.

(S'g'd) MARKHAM, PATTERSON & THOMAS,
MORRISON & WENZELL,
Attorneys for Plaintiff.

21 STATE OF COLORADO, } ss.
County of Lake. }

Charles T. Limberg, being first duly sworn, saith that he is the agent and manager of the above plaintiff company; that he has heard read the above complaint and knows the contents thereof, and that the same is true of his own knowledge.

(S'g'd) CHAS. LIMBERG.

Sworn and subscribed before me this —— day of May, A. D. 1884.

(S'g'd) FREDERICK O. L. BUCK,
[SEAL.] *Notary Public.*

Endossed: No. 1152. U. S. Court, district of Colorado. The Arkansas Valley Smelting Company *vs.* The Belden Mining Company. Amended complaint. Filed May 21, 1884. S'g'd Edward F. Bishop, clerk. Markham, Patterson & Thomas, Morrison & Wenzell, attorneys for plaintiff.

22 And afterwards, and on, to wit, the 24th day of May, A. D. 1884, the same being one of regular juridical days of the May term, A. D. 1884, of said court. Present, the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Defendant to Answer in Twenty Days.

THE ARKANSAS VALLEY SMELTING COMPANY
vs. } 1152.
THE BELDEN MINING COMPANY.

Action on a Contract.

At this day comes the said defendant by H. T. Rogers, Esq., its attorney, and on its motion it is ordered by the court, that day, until twenty (20) days from this day is allowed the said defendant to answer the amended complaint herein, as it shall be advised.

And afterwards, and on, to wit, the 12th day of June, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court. Present the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Time to Answer Extended Ten Days.

23 THE ARKANSAS VALLEY SMELTING COMPANY
vs. } 1152.
THE BELDEN MINING COMPANY.

Action on a Contract.

At this day comes the said defendant by H. T. Rogers, Esq., its attorney, and on its motion, and for good and sufficient reasons to the court appearing, it is ordered that the said defendant have day

until ten (10) days from this day in which to answer herein, as it shall be advised.

And afterwards, and on, to wit, the 23rd day of June, A. D. 1884, came again the said defendant by Messrs. Rogers & Cuthbert, its attorneys, and filed in said court and in said cause its demurrer to the amended complaint heretofore filed herein. And the said demurrer to amended complaint is in words and figures as follows, to wit:

Demurrer to Amended Complaint.

UNITED STATES OF AMERICA, }
State and District of Colorado. } *ss.*

In the Circuit Court of the United States within and for said district.

THE ARKANSAS VALLEY SMELTING COMPANY
vs.
THE BELDEN MINING COMPANY.

And now comes the above named defendant by Rogers & Cuthbert, its attorneys, and demurs to the complaint heretofore
24 filed herein, and as grounds for said demurrer alleges:

I. That plaintiff has no legal capacity to sue in this action, because it appears in and by said complaint that plaintiff is not such assignee of the contract, or of the G. Billings, or of the Billings & Eilers, mentioned in said complaint, as will entitle it to sue in this action.

II. That said complaint does not state facts sufficient to constitute a cause of action, among other things, in this, to wit, because it appears in and by said complaint that the contract therein set forth could not be assigned; that the said contract was personal in its nature, and could not, by the pretended assignment thereof to plaintiff, vest plaintiff with any power to sue this defendant upon the alleged breach of said contract, and because said complaint doth not state that the pretended assignment of said contract was made in writing, as by the statute in such case it is made and provided, and for other reasons apparent on the face of said complaint.

III. That the complaint is ambiguous, unintelligible, and uncertain, in this, to wit, that neither the said complaint nor the contract therein set forth state the manner in which the price or value of the ore therein mentioned was to be determined or paid for; that
25 said contract set forth in said complaint is so uncertain and indefinite that it cannot be determined in what manner the parties executing the same intended to fix the price or value of said ore; that it does not appear in or by said complaint in what manner plaintiff has suffered the alleged damages therein claimed; and that said complaint is otherwise ambiguous, unintelligible, and uncertain, as appears upon the face of said complaint.

(S'g'd) ROGERS & CUTHBERT,
Att'ys for Def't.

(Endorsed:) No. 1152. U. S. circuit court, dist. Colo. The Ar-

kansas Valley Smelting Co. *v.* The Belden Mining Company. Demurrer to amended complaint. Filed Jun. 23, 1884. (S'g'd) Edward F. Bishop, clerk. Rogers & Cuthbert, att'ys for def't.

And afterwards, and on, to wit, the 15th day of October, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court.

Present: The Honorable Moses Hallett, district judge.

The following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Demurrer to amended complaint sustained.

THE ARKANSAS VALLEY SMELTING COMPANY, a Corporation,
vs.
26 THE BELDEN MINING COMPANY, a Corporation. } 1152.

Action on a Contract.

At this day comes the said plaintiff, by C. H. Wenzell, Esq., its attorney, and the said defendant by H. T. Rogers, Esq., its attorney, also comes.

And the demurrer of the said defendant to the amended complaint herein coming on now to be heard, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said amended complaint and the matters and things therein contained is not sufficient in law, and so the said demurrer is sustained.

And thereupon, on motion of the said plaintiff, it is ordered that it have leave to again amend its complaint herein within ten (10) days from this day, as it shall be advised.

And afterwards, and on, to wit, the 22nd day of November, A. D. 1884, the same being one of the regular juridical days of the October Term, A. D. 1864, of said court.

Present: The Honorable Moses Hallett, district judge.

The following proceeding was had and entered of record in said court and in said cause, to wit:

27 *Order. Judgment for Defendant on Demurrer.*

THE ARKANSAS VALLEY SMELTING COMPANY
vs.
THE BELDEN MINING COMPANY. } 1152.

Action on a Contract.

At this day comes the said defendant, by H. T. Rogers, Esq., its attorney, and the said plaintiff abiding by its said complaint as amended, on motion of the said defendant:

It is considered by the court that the said defendant go hence hereof without day, and have and recover of and from the said plaintiff its costs by it in this behalf laid out and expended, to be taxed and have execution therefor.

And afterwards, and on, to wit, the 2d day of December, A. D. 1884, came again the said plaintiff, by its attorneys aforesaid, and filed in said court and in said cause its assignment of errors and bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States, and said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the Eighth Judicial Circuit of the United States within and for said District.

THE ARKANSAS VALLEY SMELTING CO.
vs.
THE BELDEN MINING COMPANY.

The plaintiff above named, by Morrison and Wenzell and Patterson & Thomas, its attorneys, now comes and says that in the record and proceedings in the above-entitled cause there is great and manifest error in this, to wit:

The court below erred in sustaining the demurrer of the defendant to the amended complaint of the plaintiff, and in giving judgment for the defendant on said demurrer.

Wherefore, and by reason of such error, the plaintiff prays that the above judgment may be wholly reversed, annulled, set aside and for nought held, and the plaintiff restored to its rights as fully and completely as though no such judgment had been rendered.

(S'g'd). By MORRISON & WENZELL,
PATTERSON & THOMAS,
Att'ys for Pl'ff.

(Endorsed:) 1152. The Arkansas Valley Smelting Co. *v.* The Belden Mining Co. Assignment of errors. Filed Dec. 2, 1884. (S'g'd) Edward F. Bishop, clerk. Morrison & Wenzell, Patterson & Thomas, att'ys for pl'ff in error.

And the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that The Arkansas Valley Smelting Company, as principal, and ——— ——— ——— ———, as sureties, are held and firmly bound unto The Belden Mining Company in the full and just sum of five hundred dollars, to be paid to the said Belden Mining Company: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this —— day of November, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the October term, A. D. 1884, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between The Arkansas Valley Smelting Company and The Belden Mining Company, defendant, judgment was rendered against the said The Arkansas Valley Smelting Company, and the said company having obtained a writ of error to reverse the judgment of said court, and a citation directed to the said Belden Mining Company citing and admonishing it to appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said The Arkansas Valley Smelting Company shall prosecute said writ to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) THE ARKANSAS VALLEY SMELTING CO. [SEAL.]
CHAS. LIMBERG, *Gen'l M'g'r.* [SEAL.]
CHAS. LIMBERG. [SEAL.]
LOUIS VERDIN. [SEAL.]

Approved.
MOSES HALLETT, *Judge.*

31 *Justification.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Chas. T. Limberg and Louis Verdin, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real property the sum below set opposite his name, that is to say: As to Chas. T. Limberg, five hundred dollars, as to Louis Verdin, five hundred dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) CHAS. LIMBERG.
LOUIS VERDIN.

Subscribed and sworn to before me, at Leadville, this 1st day of Dec'r, A. D. 1884.

[SEAL.] (S'g'd) SAM'L ADAMS,
Notary Public, Lake Co., Colo.

(Endorsed:) Gen. No. 1152. Circuit court of the United States, district of Colorado. The Arkansas Valley Smelting Co. *vs.* The Belden Mining Company. Bond, $500. Filed this 2d day of December, A. D. 1884. (S'g'd) Edward F. Bishop, clerk, by N. W. Tupper, deputy clerk.

32 And the said writ of error and citation are hereto attached, to wit:

33 *Writ of Error to Circuit Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of of the judgment of a plea which is in the said circuit court, between the Arkansas Valley Smelting Company and the Belden Mining Company, a manifest error hath happened, to the great damage of the said the Arkansas Valley Smelting Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of December, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 109th year.

EDWARD F. BISHOP, *Clerk,*
By CHAS. W. BISHOP, *Deputy Clerk.*

Allowed by—
MOSES HALLETT,
District Judge.

33½ *Return.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 8th day of December, A. D. 1884.

[Seal of United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By CHAS. W. BISHOP, *Deputy Clerk.*

[Endorsed:] Gen. No. 1152. Circuit court of the United States. The Arkansas Valley Smelting Co., plaintiff in error, *vs.* The Belden Mining Company. Writ of error to Supreme Court U. S., district of Colorado. Filed in circuit court of the U. S., this 2d day of December, A. D. 1884. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Patterson & Thomas, attorney- for plaintiff in error.

34 *Citation, U. S. Circuit Court.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to the Belden Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Arkansas Valley Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 2d day of December, in the year of our Lord one thousand eight hundred and eighty-four.

MOSES HALLETT, *Judge.*

34½ *Proof of Service.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

On this 2nd day of December, A. D. 1884, personally appeared E. A. Clark before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Lucius M. Cuthbert, one of the firm of Rogers & Cuthbert, att'ys for def't in error, at his office in Denver, Colorado.

E. A. CLARK.

Sworn to and subscribed before me, this second day of December, A. D. 1884.

[Seal of United States District Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By CHAS. W. BISHOP, *Deputy Clerk.*

[Endorsed:] Gen. No. 1152. Circuit court of the United States, district of Colorado. The Arkansas Valley Smelting Co., plaintiff in error, *vs.* The Belden Mining Company, defendant in error. Citation. Filed in circuit court of the U. S., this 2d day of December,

A. D. 1884. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Patterson & Thomas, attorney- for plaintiff in error.

35 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein The Arkansas Valley Smelting Company was plaintiff and The Belden Mining Company was defendant, as fully and completely as the same still remains of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this eighth day of December, A. D. 1884.

[Seal of United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By CHAS. W. BISHOP, *Deputy Clerk.*

Endorsed on cover: Colorado C. C. U. S. No. 1252. The Arkansas Valley Smelting Company, plaintiff in error, *vs.* The Belden Mining Company. Filed December 29, 1884.

124-379
127-379

In the Supreme Court

Of the United States.

OCTOBER TERM, A. D. 1884.

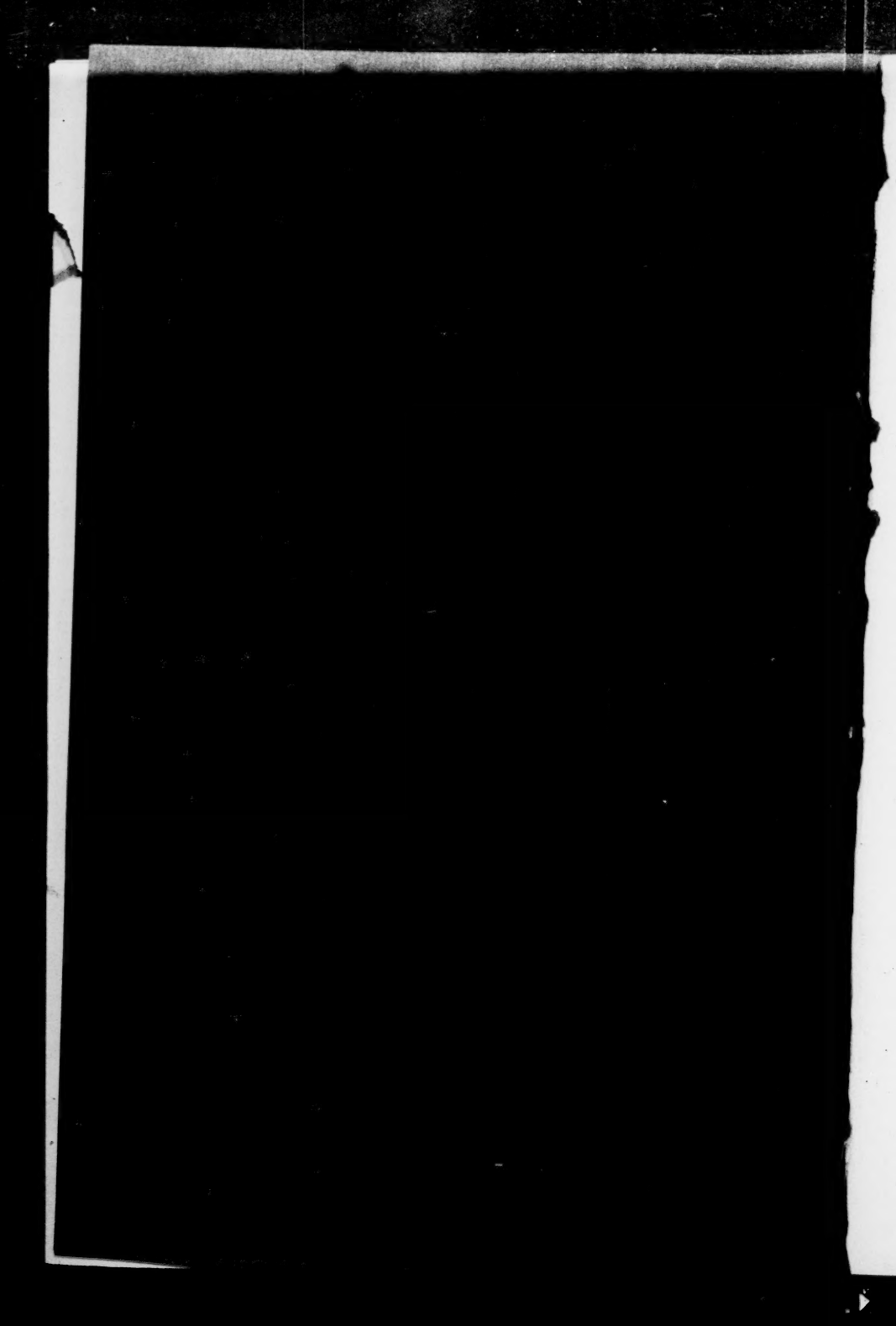
No. 1252.

THE ARKANSAS VALLEY SMELTING COMPANY, Plaintiff in Error, vs. THE BELDEN MINING COMPANY, Defendant in Error.	Error to the Circuit Court of the U. S. for the District of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

R. S. MORRISON,
T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Plaintiff in Error.

WHIPPLE & PIERSON, PRINTERS, DENVER.



In the Supreme Court

Of the United States.

OCTOBER TERM, A. D. 1884.

No. 1252.

THE ARKANSAS VALLEY SMELTING COMPANY, Plaintiff in Error, vs. THE BELDEN MINING COMPANY, Defendant in Error.	Error to the Circuit Court of the U. S. for the District of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 12th day of July, 1881, the defendant company entered into a contract with Billing & Eilers, of Leadville, Colorado, for the sale of a certain lot of carbonate lead ore. The defendant was a mining company engaged in extracting and selling ores from certain mines on Battle mountain, in what was then Summit county, Col-

orado; and Billing & Eilers were the owners of a smelter, and, as such, bought the products of the various mines of that and the surrounding mining districts. By this contract the defendant company agreed to furnish, sell and deliver to Billing & Eilers ten thousand tons of carbonate lead ore at a certain price agreed upon; and the latter contracted to receive and pay for the same. The company was to commence delivering the ore as soon as the railroad was completed to its mines; and to deliver at least fifty tons per day, with an option of a larger amount, until the entire ten thousand tons had been delivered. The railroad was completed on Nov. 30, 1881; and the defendant commenced its shipments of ore, shipping before Jan. 1, 1882, about one hundred and seventy-six tons. On Jan. 1, 1882, the firm of Billing & Eilers was dissolved and its property, together with all ore contracts, was assigned to G. Billing, who continued the operations of the smelter. Nothwithstanding this assignment of the contract the defendant continued to sell its ore under the same to G. Billing, and ship it to his smelter; and between Jan. 1, 1882, and April 21 of the same year, sold him nearly nine hundred tons. On May 1, 1882, G. Billing assigned his smelter and ore contracts to the plaintiff, The Arkansas Valley Smelting Company; and among these contracts was the one with the defendant. The defendant ceased sending ore to G. Billing about April 21, 1882, and on Nov. 1 of the same year, refused to perform its agreement entirely, and notified the plaintiff that it should consider the contract as cancelled and annulled.

The plaintiff having succeeded to the rights of Billing & Eilers by direct assignment of the contract, averred its readiness to proceed according to its terms, and, upon this refusal of the defendant, brought its action for damages. Suit was instituted March 27, 1883; the defendant

demurred to the complaint as first filed, and, on the demurrer being sustained, plaintiff filed an amended complaint. Another demurrer was interposed and again sustained, upon the ground that the contract was not assignable, and so no facts were stated sufficient to constitute a cause of action. It is to this ruling of the court, and the judgment pronounced upon it, that plaintiff in error has sued out its writ and upon which it hopes to secure a reversal.

SPECIFICATION OF ERRORS.

But one error has been assigned and this was the action of the court below in sustaining the defendant's demurrer to the plaintiff's amended complaint. While three of the statutory grounds were relied upon in the demurrer there were but two points relied upon by counsel and considered by the court. These points were, (1) that the contract sued upon was not assignable; and (2) that even if the contract were assignable the action should have been brought in the name of the assignor and not of the assignee. It is thus claimed by plaintiff in error that the court erred in holding the contract of July 12, 1881, between the defendant and Billing & Eilers to be not assignable, and in holding that the action should have been brought in the name of the assignor.

ARGUMENT.

1. *Was this contract assignable?* That the court below erred in holding this agreement to be non-assignable is, we think, plain after a careful review of all the authorities. So far as the decisions of this tribunal are concerned we are without a guide, except in its unbroken adherence to the principles of the common law and the underlying rules of justice on which they are grounded; but the English courts and our many state tribunals have

given adjudications that show us clearly what the law is. None of the cases establish a difference as to the rule of law that governs the assignability of contracts, although some have differed in applying it to particular states of fact; and such seems to have been the point wherein the court below has erred. But a review of *all* the cases, and attention to the principles upon which they are based, will, we think, convince the court that the rule goes far beyond the contract in the case at bar, and, in whatever light we may look at it, certainly makes it assignable.

The old common law doctrine as to the non-assignability of chases in action of every description is well understood and has been frequently commented upon. The state of society which then existed could have produced no other result, and so long as it lasted, must have continued those rules. The feudal system absolutely prohibited the transfer of real property; and the doctrines of political economy then prevalent discouraged exchange among the people of the same states, and almost prohibited it between people of different states. Paternal government, as it is termed by Mr. Buckle, was everywhere prevalent, and, to the utmost of its power, sought to control and limit what modern economics term exchange. But with an increase of inhabitants and an improvement in knowledge the commercial class rose in power, and forced upon the people new ideas and upon the law new rules and principles. The fundamental idea of the commercial world was exchange, the exchange of commodities of every description and with the greatest freedom. This principle is now the cardinal stone of every system of political economy, and has extended its influence in every direction, throwing off all the old restraints upon the alienation of land, and giving to many forms of personal property almost the quality of money, with such ease do they pass from hand to hand. Every form of

property can now be assigned and transferred with little or no restraint, and the present policy of the law, both in theory and practice, is to encourage this system of exchange.

In no department of the law have these new ideas worked so complete a revolution as in that relating to the assignability of choses in action and executory contracts. Lord Holt's vigorous resistance to the claims of the assignee of a promisory note is not of so ancient a date; and yet, to-day the assignee of almost every form of contract, executory and executed, asserts his claims in the courts of law, and has them admitted without question. We believe that *now* this change in policy will cause the courts in every doubtful instance to lean to the side of assignability in all classes of choses in action and contracts, and to deny the right only in those instances where, from the evident nature of the contract, or the clearly expressed intention of the parties, it is evident the same was intended to be purely personal between the original contractors. With these general principles in view let us look at the decisions governing the contract set forth in the case at bar.

This is an executory contract, and the present rule as to the assignability of such instruments is that all contracts may be assigned either before or after breach, which were not entered into upon one side or the other upon the basis of a personal trust in the peculiar fitness of the other party to perform his part. The illustration so often used is that of the contract of the author to write a book; the artist to paint a picture, or in modern days, the base ball pitcher to play his best; none of which can be assigned on the part of the person whose genius or skill is depended upon. But an agreement to pay $1000 for a valuable consideration, or to deliver ten tons of coal at so much per ton, cannot belong to this class of cases,

as in either instance it can make no difference to either party who executes the other part of the contract. Where taste, skill or genius is one of the elements relied upon the contract cannot be assigned; where it is only a question of so much lost or so much gained, whoever performs the contract, it may be assigned.

To which class does the contract in the case at bar belong? Reduced to its elements the contract amounts to no more than an agreement on the one side to sell ten thousand tons of ore, and on the other to receive and pay for the same. It makes no difference to the one party who gives him the ore, nor to the other who pays him the price; all that both parties want is what they have contracted to get. No peculiar fitness on either side is needed to fulfill the contract, and, in point of fact, the contract is one which from its very nature has to be performed largely through the medium of agents. The contract is no more nor less than an article of property to each party, and the policy of the law is to let such articles of property pass from hand to hand with as much freedom as is requisite to make them valuable.

While all the cases lay down the rule as we have above stated, the New York Court of Appeals has given us a criterion by which we can the more readily bring the present case within the terms of the rule. This criterion is, that whatever contracts are binding upon the executors or administrators may be assigned, while those that die with the person cannot be assigned. While it is true that in both instances we must go back to the principle of personal skill, taste or genius, as the real test, the fact that this has been the test so far as executors and administrators are concerned for centuries of the common law, will make it much easier to apply in the matter of the assignability of contracts. So that all the cases deciding the question of the liability or rights of the executor or

administrator upon executory contracts of the decedent, can be quoted as applicable to the question of the assignability of contracts. The language of Mr. Justice Allen, in delivering the judgment of the New York Court concisely states this principle:

"It is not disputed that in all cases where the executor or administrator would succeed to the rights and liabilities of a deceased party to a contract, the contract is assignable by the act of the parties; the personal representative of a deceased being regarded but the legal assignee upon whom the law devolves the rights and obligations of their testator or intestate. * * * * The assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed, rather than the supposed intent of the parties, except as that intent is expressed in the agreement. Parties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations. But when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry, or engagements for personal services requiring skill, science or peculiar qualifications, may be assigned, and by them the personal representatives will be bound. * * * * When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract."

Devlin vs. Mayor *et al.*, 63 N. Y., 8, 16.

Adopting the law as here laid down we think it will put the matter in a clearer light to the court to call its attention first to those cases in which the courts have ap-

plied the rule to executors and administrators, and then to the assignment of executory contracts.

The general rule as to executors is stated by the Queen's Bench in the time of Queen Elizabeth to be that "a covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed by the person of the testator which they cannot perform."

Hyde vs. Dean of Windsor, Croke Eliz., 552.

Lord Coke a few years later, in the case of Quick vs. Ludbarrow, 3 Bulst., 30, states the rule to be the same, and says that if one is bound to build a house for another before such a time and dies, his executors are bound to perform the contract. While this was a *dictum* so far as that case was concerned it is valuable as an illustration of how ancient the principle we are contending for is, and it is also valuable in that the great chief justice goes back yet further for his authority, citing to support it the Year Books for 31 Henry VI, and 15 Henry VII.

Lord Mansfield has also given us a clear statement of the law in delivering the unanimous judgment of the King's Bench; and in accord with the view contended for.

Humbly vs. Trotht, 1 Cowp., 371.

The Barons of the Exchequer have affirmed the *dictum* of Lord Coke by deciding that where the testator had contracted to build a wooden galley and died before any of the work was done and his executors had gone on and completed the work, the executors might sue on the contract and recover. Lord Lyndhurst putting his decision on the ground of the difference between contracts personal in their nature and those that are not.

Marshall vs. Broadhurst, 1 Tyr., 348; S. C. 1 Cr. and J., 403.

The same court held, *per* Baron Parke, that "executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is they are not liable in those cases where personal skill or taste is required."

Siboni vs. Kirkman, 1 M. and W., 417; S. C. Tyrw. and G., 777.

This case was taken to the Exchequer Chamber and a new trial awarded (4 M. and W. 339) on the question of the admissibility of evidence, but in no way affecting the point here decided.

And perhaps the best illustration of the rule in its application to the case at bar is to be found in the case of Wentworth vs. Cock, 10 A. and E., 42. There the plaintiffs had entered into an agreement with the intestate to deliver him a certain quantity of slate per month and had but partly performed the contract when the intestate died. It was held that an action lay against the administrator for refusing to receive the slate after the death of the testator and before the expiration of the time named in the contract. It is somewhat difficult to distinguish that case from the one at bar in any particular, if we substitute an assignee in place of the administrator.

Same case, 37 E. C. L., 47.

Numerous other decisions are to be found in the English reports announcing the same principles, but these leading cases and the following in which the rule is applied to states of fact analogous to those in the case at bar will, we think, convince the court of the soundness of our view.

Williams Executors, 1227.

Walker vs. Hull, 1 Lev., 177.
Hyde vs. Skinner, 2 Pere Will., 196.
Werner vs. Humphreys, 3 Scott. N. R., 226.
Berisford vs. Woodruff, Croke Jac., 404; S. C. 1 Roll Rep., 433.

A rule so unanimously declared to be a maxim of the common law has never been doubted by the American courts.

Petrie vs. Vorhees, 18 N. J. E., 285.
Woods vs. Ridley, 27 Miss., 119.
Pringle vs. McPherson, 2 Dessaus, 524.
White vs. Commonwealth, 39 Pa. St., 167.

A somewhat lengthy examination of the rule and the cases was made by the Supreme Court of Pennsylvania in one case, and while the view taken of some of the English cases is not in accord with ours the principles are, on the whole, the same; and it seems to acknowledge the rule applied in New York as to assignability.

Dickinson vs. Callahan, 19 Pa. St., 227.

If we admit the rule laid down in New York it does not seem possible to prevent the case at bar from being brought within the above decisions and the contract held to be not personal. But we are not forced to rely upon these cases, as there have been enough adjudications upon the exact docrine of the assignability of contracts to bring this case far within the limits laid down, and to settle beyond controversy the question of the assignability of this contract.

The English courts have not in terms announced the doctrine stated in New York; but they have, by applying

the same principles to both personal representatives and assignees, made it practically the same. The fundamental principle of personal and non-personal contracts runs through all the cases.

The case that has been the great authority on the question of the assignability of contracts and has also been cited and relied upon in nearly every case where the question of passing upon the personal nature of a contract arose, is that of Robson vs. Drummond, 2 Barn. and Adolf., 303. This decision undoubtedly formed the basis of the judgement of the court below. In this case a coachmaker agreed to furnish a customer a carriage for the period of five years and keep the same in repair at a certain price per year, and afterwards assigned his contract; the court held that it was a personal contract and could not be assigned. Lord Tenterton and the other justices putting their decision on the ground of the personal nature of the contract.

In Wentworth vs. Cock, decided a few years later, this case was confidently relied on to show that the contract there in dispute was also personal; but the court did not so consider it. It is difficult to see, however, how the one contract could have been regarded as personal and the other not; and, indeed, Mr. Justice Patteson to do so, attempts to make a distinction between personal contracts that are binding on the personal representative and those that can be assigned. These two cases, however, did much to settle the doctrine as to the nature of contracts so far as transferability was concerned, and when the question again arose we were given a philosophical decision that would seem to have settled the law on a definite basis.

In British Waggon Company vs. Lea 5, L. R., Q. B. Div., 149, the court of Queen's Bench passed on a contract of this character and distinguished it from the case of Rob-

son vs. Drummond in terms that amount to criticism. This was a case in which a company entered into an agreement to let a number of railway wagons for a term of years at an annual rent and to keep the same in repair; the contract was assigned to another company and the court held that it was assignable, and the assignee passed to all the rights of the assignor. Lord Chief Justice Cockburn pronounced the opinion of the court; and after commenting on the general rule and the case of Robson vs. Drummond, said:

"While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the court of Queen's Bench in Robson vs. Drummond, went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one in his behalf. In all these cases the maxim *qui facit per alium facit per se* applies."

This case, decided in 1880, shows the length to which the modern commercial world has pushed the courts in matter of allowing the free exchange of commodities. The three cases of Robson vs. Drummond, Wentworth vs. Cock, and British Waggon Co. vs. Lea, decided respectively in 1831, 1839 and 1880, are successive stepping stones in this one direction which the policy of the law has taken. They demonstrate clearly that in all doubtful cases we can with almost an absolute certainty depend upon the

court leaning to the side of assignability in executory contracts.

The American authorities are, if it were possible, much stronger upon the side of assignability than are the English. No state has rendered a greater number of decisions, and all to the same end, on this question than New York; and, in view of her great commercial power, no state should be listened to with more respect. We have already quoted from the case of Devlin vs. Mayor, 63 N. Y., 8, which is one of the latest cases and has gone most thoroughly to the bottom of the subject. In that case the contract was one let by the city for the sweeping and cleaning of its streets, and the court held it to be assignable. Two other cases in New York have been decided upon contracts exactly similar to the one at bar.

In Sears vs. Conover, 42 N. Y., 113 (3 Keyes), the contract on the one side was to plant ten acres of potatoes and deliver them, when grown, at the boat in good merchantable order; and on the other side to receive all that might be grown and pay for them at 12s. per barrel. The party agreeing to receive and pay for the potatoes assigned his contract, and the court held the assignment valid and the contract binding on the other party. See also the same case in 34 Barb., 330.

In Tyler vs. Barrows, 6 Robt., 104, the defendants agreed to sell and deliver to the plaintiff's assignors, at a specified price, a certain number of barrels of oil, by installments consisting of a certain number of barrels each, at intervals of fifteen days, until the whole was delivered, provided the buyers gave notice, at such times, of their intention to receive the same; and the buyers agreed to pay the price for so many of said installments as they should notify the defendants of their intention to take, and should receive, and also to pay a certain sum for every one of such installments which they should fail

so to notify the defendants of their intention to take. The Superior Court of the city of New York held this contract to be assignable.

Both of these contracts are counterparts of the one in the case at bar, all being for the delivery of a certain product at a certain time for a certain price. If there is any difference it is in favor of the contract in the present case; for this is simply an agreement to deliver ten thousand tons of ore and receive the price for the same, with no options or collateral promises at all, so far as the plaintiff is concerned. It is impossible to distinguish between the cases or to look upon them other than as mere business transactions. Mr. Chief Justice Robertson, in the case last cited, struck the key-note upon which the whole controversy turns. He said:

"There was nothing in this contract to deprive it of the quality of assignability. There was no agreement for the rendering of personal services, or doing anything dependent upon personal quality, and the price was to be paid in cash. The defendants could demand nothing more from the buyers or their assignees, than the payment of the stipulated price, which was tendered. The right of electing to take the oil was *property*, capable of being transferred, and included of course the right of giving notice, and all other rights flowing therefrom."

It is this right of property that constitutes the test of assignability. If the rights of property stipulated for in the contract are such that they can be transferred, the contract will be assignable and otherwise not. In the case of personal contracts the *right of property stipulated for is the right to so much of the contractor's skill, or genius, or taste*, and this from its very nature cannot be transferred; in other contracts the right of property is the right to so much of a certain product that at the time it is contracted is the property of the contractor, but would

be just as valuable as the property of another person. The one *pertains to the person;* the other *belongs to a person.* The one cannot be transferred, the other can.

Many other cases are to be found in the American reports that announce the same principles and apply them to similar states of facts. Chief among them are the following:

Horner vs. Wood, 23 N. Y., 350.
Taylor vs. Palmer, 31 Cal., 240.

See Mr. Justice Sanderson's somewhat vigorous and vivid statement of the principle in this latter case at page 247 of 31 Cal.

Parsons vs. Woodward, 22 N. J. L., 196.

In the case just cited from New Jersey the court held that a contract to deliver at a certain price a quantity of trees of a specified kind was assignable, although the trees were to be grown after the contract was entered into.

Philadelphia vs. Lockhardt, 73 Pa. St., 211.
Lafferty vs. Rutherford, 5 Ark., 649.
St. Louis vs. Clemens, 42 Mo., 69.
Groot vs. Story, 41 Vt., 533.

The reports show us many cases in which contracts have been held to be personal and not assignable, but the majority are clearly on the other side of the line that is drawn by all the authorities, and only two or three need any special mention by us.

Boston Ice Company vs. Potter, 123 Mass., 28, may seem at first view to be against the position taken by us in regard to the particular state of facts in the case at bar; but, we think, on examination it will be found the other way. The opinion of Mr. Justice Endicott clearly states

the rule and bases the decision in the case upon the particular facts disclosed.

Landsden vs. McCarthy, 45 Mo., 106, in view of the facts then existing, might also be cited as against the contract in the present case. The court admit the general principle and decide that the contract there sued upon is personal. We cannot but believe that if the application there can be construed as against the contract at bar, the court erred in its judgment. The personal nature of the contract was held to consist in the fact that one party had relied upon the credit and ability of the other party to pay the price named. Such a view, if accepted, would do much to put an end to the assignability of all contracts and choses in action; for all contracts are entered into with the belief that the other party will perform his part. And the court, too, seems to forget that the liability of the original parties remains the same, notwithstanding the assignment, and the contracting party may hold both assignor and assignee.

Dickinson vs. Callahan, 19 Pa. St., 227, criticises some of the English cases cited by us; but, we believe, they are clearly in the line of all the common law authorities, and they have been expressly adopted in terms by the Court of Appeals of New York in Devlin vs. Mayor, 63 N. Y., 8.

This citation of authority will, we think, convince the court of the correctness of our position as to the assignability of this contract. Nothing more can be made out of the transaction than a contract of sale. Billing and Eilers purchased the right to so many tons of ore; the Belden Mining Company purchased the right to so many dollars per ton for a certain number of tons of its ore. Neither party secured any title or right of property in the taste, skill or genius of the other party, but simply a title to a definite, tangible, merchantable article that was

readily capable of passing from hand to hand. Every element of the contract partakes of the purely mercantile transaction, and the attempt to place it in the category of those contracts that depend upon personal skill, taste or genius, seems to us an absurdity. No one can doubt the right of Billing and Eilers to sell the ore *after* they had received it from the mining company, and for what reason should they be denied the right of selling it before they received it? The ore itself was certainly capable of being sold, and the right to the ore would seem to be an equal object of barter.

There is another principle upon which we rely and which we think is conclusive of the present case. It is maintained that whether or not this contract is assignable, the defendant cannot now deny it the quality of assignability. The contract has been assigned twice, and, as under the first assignment the defendant made no objection, but dispensed with whatever rights it had, it is now estopped from denying to the first assignee the same right that it gave to his assignor. If the contract was not assignable in the first place, the implied condition arising from this fact was that upon assignment by either party the other had a right to treat the contract as at an end; but once waived the condition was gone and could no more be insisted upon. This is a principle so old and well-grounded in the common law as to require little or no authority for its support. It has been frequently applied to cases where the contract in express terms provided against assignment, and declared that if assigned the contract should be at an end; and surely it will be applied to a case where the same thing was implied. And it would seem to us that the court would be readier to apply the principle in doubtful cases, than where it was expressly provided for. If the contract is claimed to be personal by one party and not personal by the other, and

the court is to determine the question by reference to the intention of the parties, it is surely competent for it to look at the treatment of the contract by the parties. If the party who claims that the contract is personal has treated it as not personal, this should be conculsive evidence that at the time it was entered into it was the intention of the parties that the contract should not be considered as personal. The present case it seems to us is brought clearly within the spirit and letter of this rule of law.

Murray vs. Harway, 56 N. Y., 337.

2. *Should the action have been commenced in the name of the assignor?* While counsel for defendant in error relied upon this point, and the court seemed to agree with him, that the action should have been commenced in the name of the assignor, we cannot believe that such would have been its decision had this been the main question at issue. We believe it clear that, if it be admitted that this contract was assignable, there can be no doubt that under the Federal practice in the district of Colorado, the action should have been brought in the name of the assignee.

Under the practice of the state courts there can be no question as to the rule. The Code provides that "every action shall be prosecuted in the name of the real party in interest." (Sec. 3, Colo. Code Civil Procedure). This is the substantial language of all the revised systems of procedure that are now in force through the various states; and it is almost the unanimous judgement that, whether the party's rights be legal or equitable, he must sue in his own name if he is to reap the benefits of the action. While there may be cases in which it is difficult to decide who is the real party in interest, we know of no

authority that denies the right of such party to sue when he is clearly the real party in interest.

Pom. Rem. and Remed. Rights, Sec. 124, *et seq.*

This section of the Code was undoubtedly passed to meet just such cases as the one at bar. One of the *forms*, for it was merely a form, of the old system was that the assignee of a chose in action or executory contract, other than a negotiable instrument, had no legal title, and, if he sued in a court of law, must bring his action in the name of his assignor; and this section did away with that form or fiction. So clearly is this the intention that, no difference what the object may be, if it is assignable, the assignee may sue in his own name, even a claim for damages for a tort.

More vs. Massim, 32 Cal., 590.

But we presume that this is all admitted by the court, and the ground of its decision was that in the federal tribunals the distinction between the law and equity sides is still preserved. It is admitted that under the common law system the assignee in this case would have been compelled to sue in the name of his assignor had he brought his action in a court of law, and in his own name had he sued in equity: and the opinion of the court was that this is still the rule in the federal courts. In our opinion the decisions of this tribunal leave us no room for doubt as to the error of this view.

By the act of Congress of June 1, 1872, it is declared that "the practice, pleadings, and forms and modes of proceedings, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit

or district courts are held, any rule of court to the contrary notwithstanding." (Sec. 914, Rev. St.) The effect of this statute has been passed upon several times by this court; and, we think, in favor of the view that the assignee must sue in his own name in the Federal courts located in those states that declare the real party in interest must sue. It is admitted that, no difference in whose name the suit is brought, the assignee is the party benefited in case he wins; and, surely, it is a mere matter of form or practice whether he sues in his own name, or in the name of the assignor for his use and benefit. If the distinction is one affecting the right of the parties at law or in equity, we admit that the above statute has made no change; but if it is merely a matter of "practice, pleadings, form or mode of proceeding," the statute has made a change and the assignee is entitled to bring an action at law in his own name. As stated by this court in regard to the above statute: "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and state courts of the same locality."

Nudd *et al.* vs. Burrows, Assignee, 91 U. S., 426.

In Thompson vs. Railroad Companies, 6 Wall., 134, the court passed upon what was substantially this point. It was there held that in an action commenced in a code state in the name of the real party in interest should be prosecuted in the same way on its removal to the Federal court. The court says: "In this case, as the action was a purely legal one, if they could have maintained it in their names in the state court, they had an equal right to maintain it in their names when it arrived in the Federal court." If this was the opinion of this court in 1867, what must its decision be now, since the passage of the act of 1872?

Decisions since then recognize the fact that in all matters of form the statute compels the Federal tribunals to proceed according to the code enactments of the locality in which they may be sitting.

Nudd *et al.* vs. Budd, Assignee, 91 U. S., 426.
Indianapolis R. R. Co. vs. Horst, 93 U. S., 291.
Hanrick vs. Patrick, 119 U. S., 156.

No further argument is needed to show the correctness of these views. It makes no difference upon what side of the court the plaintiff sought relief, in either case it must have sought it in its own name: if on the equity side the rules of equity practice entitled it to sue in its own name, and not in that of the assignor; if on the law side, the system of procedure in force in the district of Colorado gave it the same right. It seems somewhat strange that this system should govern the allegations of the complaint, should compel the statement of substantial facts and not conclusions of law, should do away with all the old forms of action, should set forth the grounds of demurrer and compel them to be stated, should regulate the amendment of pleadings, and should at the same time deny the right of doing away with the useless form of suing in the name of the assignor for the use of the assignee, when the name of the latter accomplishes the same result. The reformed systems crop out in every page of the record in this case, and should surely govern in the point that is most technical of all.

We think that these authorities, and our reasons for believing that the case at bar is included in their scope, will be sufficient for the consideration of the court in this case. They seem to us to show that the contract sued upon was clearly assignable, and that, even if it was not, the defendant is estopped from denying that it was, and that the action was properly brought in the name of the

assignee, and we hope it will be equally clear to the court. While this was not the view taken by the court below, we believe it to be correct, and think that much may be accounted for by the fact that in the hurry of a trial much is taken for granted, and neither court nor counsel have time for that patient research which should always accompany the decision of a mooted point, and which is always found in the adjudications of our courts of last resort. We ask that for the error thus committed the judgment below be reversed.

Respectfully submitted,

R. S. MORRISON,
T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Plaintiff in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 246.

JAMES MOSHER, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JULY 13, 1885.

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Respectfully submitted,

R. S. MORRISON,
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Attorneys for Plaintiff in Error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 12, 1887.

a In the Supreme Court of the United States.

JAMES MOSHER, Plaintiff in Error,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant in Error.

In error to the October term, in the year of our Lord one thousand eight hundred and eighty-five.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, District of Columbia, comes the said James Mosher, by Clinton Rowell, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the demurrer to the amended petition and the matters therein contained are not sufficient in law for the
b said St. Louis, Iron Mountain and Southern Railway Company to have or maintain a defense to the said action of the said James Mosher.

There is also error in this, to wit, that by the record aforesaid it appears that said demurrer of the said St. Louis, Iron Mountain and Southern Railway Company to said amended petition of said James Mosher was sustained and judgment given for said St. Louis, Iron Mountain and Southern Railway Company against the said James Mosher, whereas by the law of the land the said demurrer ought to have been overruled, and the said judgment ought to have been given for the said James Mosher against the said St. Louis, Iron Mountain and Southern Railway Company.

There is also error in this, to wit, that the said circuit court of the United States for the eastern district of Missouri erred in sustaining the said demurrer of the said St. Louis, Iron Mountain and Southern Railway Company to said amended petition of said James Mosher.

c And the said James Mosher prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the sustaining of said demurrer and by occasion of the said judgment, &c.

CLINTON ROWELL,
Attorney for Plaintiff in Error.

d [Endorsed:] Supreme Court U. S. Oct. term, 1885. James Mosher, pl'ff in error, *vs.* St. Louis, Iron Mountain and Southern Railway Company, def't in error. Assignment of errors and prayer for reversal.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1885, thereof, between James Mosher, plaintiff, and The St. Louis, Iron Mountain and Southern Railway Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri; dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri,
By —— ——, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

1½ *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 23rd day of June, A. D. 1885.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2,313. United States circuit court, eastern district of Missouri. James Mosher *vs.* St. Louis, Iron Mountain — Railway Co. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed 22d day of May, 1885. A. P. Selby, clerk.

2 The United States of America to the St. Louis, Iron Mountain and Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein James Mosher is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 22d day of May, in the year of our Lord one thousand eight hundred and eighty-five.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

I do hereby waive service of the foregoing citation.
St. Louis, May 28th, 1885.

BENNETT PIKE,
Att'y for St. Louis, Iron Mountain & So. R'y Co.

[Endorsed:] No. 2313. United States circuit court, eastern district of Missouri. James Mosher *vs.* St. Louis, Iron Mountain & Southern Railway Co. Citation. Filed May 22, 1885. A. P. Selby, clerk.

3 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 23rd day of February, A. D. 1884, the following, among other, proceedings were had and appear of record in said court, to wit:

JAMES MOSHER, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO., Defendant. } 2313.

Now comes defendant, by attorney, and files transcript from Jefferson county circuit court and enters appearance.

Said transcript is in words and figures as follows, to wit:

Transcript Filed.

STATE OF MISSOURI, *County of Jefferson:*

Pleas before the circuit court of Jefferson county, at a term begun and holden in the town of Hillsboro', county and State aforesaid, on the fourteenth day of January, 1884, before the Honorable John L. Thomas, judge of the twenty-sixth judicial circuit of the State of Missouri.

JAMES MOSHER, Plaintiff,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

4 Be it remembered that heretofore, to wit, on the 14th day of December, 1883, a petition was filed in the above-entitled cause, in the office of the clerk of the circuit court in and for the county of Jefferson, in words and figures following, to wit:

Petition.

STATE OF MISSOURI, *County of Jefferson,* } *ss:*

In the Circuit Court for the County of Jefferson, Twenty-sixth Judicial Circuit. January Term, 1884.

JAMES MOSHER, Plaintiff,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Plaintiff states that defendant is a corporation organized under the laws of the State of Missouri, and is a common carrier of passengers for hire on a railway owned and operated by it, which said railway starts at a point in the city of St. Louis and State of Missouri and runs from said point into and through the State of Arkansas.

Plaintiff further states that, on the 9th day of April, 1883, at the city of St. Louis, in said State, the defendant, for and in consideration of the sum of twenty-eight dollars to it paid by this plaintiff, sold a ticket to and entered into a contract with this plaintiff, whereby it agreed to transport and cause to be transported on its said railway and a line of railway connecting therewith this plaintiff as a first-class passenger from said city of St. Louis to Hot Springs, Arkansas, and return therefrom to said city of St. Louis, and whereby plaintiff was entitled to be safely and expeditiously carried as a first-class passenger to and from said points on said railway and
5 line connecting therewith, and defendant issued and delivered to plaintiff a ticket bearing that date, which is herewith filed, providing for and entitling plaintiff to transportation to said

Hot Springs and return on its said railway and line of railway connecting therewith, in which said ticket there are the following provisions:

"4th. That it is good for going passage only five (5) days from date of sale as stamped on back and written below.

"5th. That it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs railroad, at Hot Springs, Ark., within eighty-five (85) days from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date.

"6th. That I, the original purchaser, hereby agree to sign my name and otherwise identify myself as such whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void."

That said date of sale was stamped on the back of and written below said provisions in said ticket, and there was attached to said ticket various coupons, which were a part thereof, and a portion of which entitled plaintiff to be carried from Malvern, in the State of Arkansas, to Hot Springs, in the latter State, and return on the Hot Springs railroad aforesaid; that plaintiff, in accordance with said contract, was transported as a passenger from said city of St. Louis to said Hot Springs; that plaintiff, within eighty-five days from the aforesaid date of entering into said contract with defendant, being desirous of returning to said city of St.
6 Louis, presented himself and said ticket at the business and ticket office and depot of said Hot Springs railroad, the said business and ticket office and depot being then and there the business office of the authorized agent of said Hot Springs railroad at said Hot Springs, during business hours and a reasonable time before the time of departure of its train for St. Louis, and was ready and willing and offered to identify himself as the original purchaser of said ticket, to the satisfaction of and to the authorized agent of said Hot Springs railroad at said Hot Springs, Arkansas, for the purpose of entitling himself to return thereon to said city of St. Louis, and of permitting the same to be officially signed and dated in ink and duly stamped by said agent, and in all manner fully complied with the terms of said ticket on his part; but the defendant and said Hot Springs railroad failed to have an agent present then and there at said business and ticket office and depot of said Hot Springs railroad for that purpose at any time between the time plaintiff so presented himself and said ticket at said business and ticket office and depot at Hot Springs and the time of the departure of the train that plaintiff desired to take going to St. Louis aforesaid from that point, whereby said defendant and its agent and the agent of said Hot Springs railroad at Hot Springs, Arkansas, failed and refused, without any just cause or excuse, to identify plaintiff as the original purchaser of said ticket and to officially sign, date in ink, and stamp said ticket.

Plaintiff further states that, in pursuance of said contract and tender of performance of the condition of said ticket on his part as aforesaid, he boarded the train of said Hot Springs railroad
7 at said Hot Springs, and was transported thereby to said Malvern, on the line of defendant's railway, where he boarded a regular passenger train of defendant, on its line of railway going to St. Louis, within eighty-five days from the date of entering into said contract with defendant, and on the same day that this plaintiff presented said ticket at the business and ticket office and depot of said Hot Springs railroad at said Hot Springs, Arkansas, and fully performed the condition thereof on his part.

That the conductor who was then and there the agent and employee of the defendant, in charge of the passenger train of defendant on its line of railway as aforesaid, demanded fare of this plaintiff, and plaintiff then and there presented said ticket to said conductor, and informed said conductor of his presentation of said ticket at the business and ticket office and depot of the Hot Springs railroad at Hot Springs, Arkansas, and of its authorized agent there, and of the readiness and willingness and offer of this plaintiff to identify himself to the satisfaction of and to the authorized agent of the Hot Springs railroad at the business and ticket office and depot thereof at Hot Springs, Arkansas, during business hours and a reasonable time before the time of departure of its train for St. Louis, and that there was no such agent at said business and ticket office and depot at said time of presentation, or between that time and the departure of said train as aforesaid, to identify plaintiff as the original purchaser thereof or officially sign, date in ink, and duly stamp said ticket, and plaintiff then and there offered to sign his name or otherwise identify himself as the original purchaser of said ticket to said conductor; whereupon said conductor agreed, for and in behalf of defendant, as its agent and employee in charge of said train,
8 to and with this plaintiff, to transport him on said train to Little Rock, Arkansas, and have said ticket officially signed, dated in ink, and duly stamped by the agent of defendant at the latter point, and then transport him to the city of St. Louis, but that after that time said conductor, in charge of said train of defendant and acting in the capacity of agent and employee of defendant, unmindful of his duties in that respect and the rights of this plaintiff, did wilfully and maliciously and without any just cause of provocation, before reaching said Little Rock, refuse to permit plaintiff to sign his name or otherwise identify himself to him, said conductor, as the original purchaser of said ticket, and did refuse to allow this plaintiff to proceed further on said train by virtue of said contract, and did assault and beat this plaintiff, and did with force and violence put him off said train at Bryant's Station, in the State of Arkansas, on the line of defendant's railway, about the hour of noon, on the 9th day of May, 1883, where he was compelled to remain until midnight of the same day in order to proceed on his journey to St. Louis; that there was no hotel or other place of accommodation at the latter place in which plaintiff could take shelter and be comfortable, and the night was cold and rainy and a heavy hail-

storm fell during the early part of said night, and plaintiff was compelled to and did remain during the greater part of said night without fire or other means of protecting himself against cold in the depot of defendant at the latter point for the purpose of taking and did take the midnight train of defendant at the latter point and proceed to St. Louis as he originally designed, first paying as fare the sum of fifteen and $\frac{30}{100}$ dollars between the latter points.

Plaintiff says further that he was made sick by said exposure and confined to his bed by reason thereof for one week thereafter, and has not yet entirely recovered, by reason of each and all of which wrongful and unlawful acts aforesaid of defendant, its agents and employees, plaintiff says he has been damaged in the sum of ten thousand dollars, for which he asks judgment.

9

WILLIAM M. ECCLES AND
E. P. JOHNSON,
Attorneys for Plaintiff.

Endorsed: "James Mosher, pl'ff, *vs.* The St. Louis, Iron Mountain and Southern Railway Company, def't. Damages. Cl'k will issue writ to sh'ff of Jefferson county. Wm. M. Eccles & E. P. Johnson, 414 Olive Str., att'ys for pl'ff. Filed Dec. 14th, 1883. C. Tho. Horine, clerk."

Thereupon a summons was issued to the sheriff of Jefferson county on the 14th day of December, A. D. 1883, in the words and figures following, to wit:

Summons.

THE STATE OF MISSOURI, } *ss:*
County of Jefferson, }

The State of Missouri to the sheriff of Jefferson county, Greeting:

We command you that you summon the St. Louis, Iron Mountain and Southern Railway Company, if found in your county, to be and appear before the honorable judge of our circuit court on the first day of the next term thereof to be begun and holden at the town of Hillsboro', within and for the county of Jefferson, on the second Monday of January next, then and there to answer unto James Mosher upon his original petition, a copy whereof is hereunto annexed and accompanies this writ; and have you then — there this writ.

10

Witness C. Tho. Horine, clerk of our said circuit court, with the seal thereof hereunto affixed, at office, in Hillsboro', this 14th day of December, A. D. 1883.

[SEAL.]

C. THO. HORINE,
Clerk Circuit Court.

On the back of said summons appears the following return, to wit:

"I executed the within writ in Jefferson county, Missouri, on the 19th day of December, A. D. 1883, by leaving a copy of the within writ and accompanying petition as furnished me by the clerk with

George D. Hawkins, a person having charge of a business office of defendant, in the county of Jefferson aforesaid, the president or chief officer of said defendant being absent and not found in my county.

JOHN L. WEAVER, *Sheriff.*"

Endorsed: "January term, 1884. James Mosher *vs.* The St. Louis, Iron Mountain and Southern Railway Company. Original. Sheriff fee, $1.00. Filed Jan'y 14th, 1884. C. Tho. Horine, cl'k."

And afterwards, to wit, on the 14th day of January, 1884, it being the 1st day of the January term aforesaid, the following proceedings were had in said cause:

Record of Filing Petition and Bond.

"JAMES MOSHER

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.

Action for damages.

Now, at this day, comes the defendant, by its attorney, and files its petition and bond, and prays this court to make an
11 order of removal in this cause to the United States circuit court for the eastern district of Missouri for the reasons alleged in said petition. Ordered that said petition and bond be filed and laid over for consideration until to-morrow."

Which said petition for removal to the United States circuit court is in the words and figures following, to wit:

Petition for Removal of Cause to U. S. Cir. C't.

In the Circuit Court for the County of Jefferson, Missouri. Jan'y Term, 1884.

JAMES MOSHER, Plaintiff,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Petition for removal to the circuit court of the United States for the eastern district of Missouri.

Your petitioner, a corporation duly organized under the laws of this State, respectfully shows to this honorable court that the matter in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a citizen of the State of Missouri, and that plaintiff was then and still is a citizen of the State of Illinois.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

12 And he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the eastern district of Missouri.

And he will ever pray.

GEO. H. BENTON,
Def't's Att'y.

STATE OF MISSOURI, *County of Jefferson:*

I, Geo. H. Benton, being duly sworn, state that I am the attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

GEO. H. BENTON.

Subscribed by the said Geo. H. Benton in my presence and by him sworn to before me this 14th day of January, A. D. 1884.

C. THO. HORINE,
Cl'k Cir. C't.

Said petition is endorsed as follows, viz: "In the circuit court for the county of Jefferson, Missouri. January term, 1884. James Mosher, plaintiff, *vs.* The St. Louis, I. M. & S. R'y Co., defendant. No. 64. Petition for removal of cause — U. S. cir. c't. Filed Jan'y 14th, 1884. C. Tho. Horine, clerk."

And said bond is in the words and figures following, to wit:

Bond for Removal to U. S. Cir. C't.

Know all men by these presents that the St. Louis, Iron
13 Mountain and Southern Railway Company, as principal, and —— ——, as sureties, are held and firmly bound unto James Mosher in the penal sum of one thousand dollars, — the payment whereof, well and truly to be made unto the said James Mosher, heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, by these presents.

Yet upon these conditions: The said St. Louis, Iron Mountain and Southern Railway Company having petitioned the circuit court of Jefferson county, State of Missouri, in the removal of a certain cause therein pending, wherein James Mosher is plaintiff and the St. Louis, Iron Mountain and Southern Railway Company is defendant, to the circuit court of the United States in and for the eastern district of Missouri:

Now, if the said St. Louis, Iron Mountain and Southern Railway

Company, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this — day of ——, A. D. 1884.

[SEAL.] THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,

By R. S. HAYES, 1*st Vice-Pres'd't.* [SEAL.]

R. C. KERENS. [SEAL.]

FREDERICK HILL. [SEAL.]

Attest: S. D. BARLOW.
Ass't Sec'y.

Endorsed: "In the circuit court for Jefferson Co., Mo.
14 Jan'y term, '84. No. 64. James Mosher, plaintiff, *vs.* The St. Louis, I. M. & S. R'y Co., defendant. Bond for removal. Filed Jan'y 14th, 1884. C. Tho. Horine, clerk."

And afterwards, to wit, on the 16th day of January, 1884, it being the 3rd day of January term aforesaid, the following proceedings were had in said cause:

Order Removing Cause to U. S. Cir. Court.

"JAMES MOSHER, Plaintiff,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Action for damages. Petition of defendant for removal of cause to U. S. circuit court.

Now, at this day, comes the defendant, by its attorney, and presents to the court here its petition, praying this court for an order of removal in said cause to the United States circuit court for the eastern district of Missouri, for the reasons following, to wit: Because the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and because the controversy in said suit is between citizens of different States; and now, all and singular the matters contained in said petition being by the court here seen and heard, and the petitioner having filed a bond, with good and sufficient surety, for entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court against the petitioner, which said bond and securities are by the court approved, it is ordered by the court here that said petition be sustained and that said cause be forthwith removed to said United States circuit court for the eastern district of Missouri."

15 *Clerk's Certificate.*

STATE OF MISSOURI, } ss:
County of Jefferson, }

I, C. Tho. Horine, clerk of the circuit court within and for the county of Jefferson aforesaid, do certify that the above and foregoing is a true, complete, and full transcript of the record and proceedings in the above-entitled cause as fully as the same appear and remain of record in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said court. Done at office in Hillsboro' this February 5th, 1884.

[SEAL.] C. THO. HORINE,
Clerk Circuit Court.

And afterwards, to wit, on the 18th day of March, A. D. 1884, there was filed in said cause a certain demurrer to petition, which said demurrer is in the words and figures following, to wit:

Demurrer to Petition.

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1884.

JAMES MOSHER, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant. } No. 2313.

Now comes defendant and demurs to the petition in the above-entitled cause for the following reasons:

1st. That said petition fails to state facts sufficient to constitute a cause of action.

16 2d. Because the petition shows on its face that plaintiff failed to comply with the contract set out in the petition, and shows no sufficient reason why said plaintiff did not attempt to comply with the condition in said contract set out in the petition requiring said plaintiff to identify himself to the authorized agent of the Hot Springs R. R. at Hot Springs, Arkansas, and sign his name thereto.

3d. Because the conductor of the defendant, when plaintiff presented to him an irregular and improper ticket as shown by the petition, was bound under the law to reject the same and to eject the plaintiff from the train in the event that he did not pay his fare, as it is admitted by the said petition that he failed and refused to do, and was not bound to listen to or receive any explanations or statements of plaintiff as to the reason why said plaintiff has failed to comply with the condition requiring him to identify himself to the

authorized agent of said Hot Springs railroad at Hot Springs, Arkansas.

BENNETT PIKE,
Att'y for Defendant.

And afterwards, on the 18th day of March, 1884, the following motion to remand was filed in said cause, to wit:

Motion to Remand.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss:

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, A. D. 1884.

JAMES MOSHER, Plaintiff,
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Now comes the said plaintiff and moves the court to remand said cause to the circuit court for Jefferson county in the 26th
17 judicial circuit of the State of Missouri, for the following reasons:

1. Because this honorable court has no jurisdiction to hear or try said cause.

2. Because said cause was wrongfully and improperly removed from said circuit court of Jefferson county to this honorable court, and there was and is no law of the United States authorizing or permitting said removal.

3. That said cause was instituted by plaintiff, who is a non-resident of the State of Missouri, against defendant, that is and always has been a resident of the State of Missouri, in said circuit court of Jefferson county to recover damages for personal injuries inflicted on plaintiff by defendant, and this honorable court has not and cannot acquire any jurisdiction to hear or try said cause or render judgment therein by reason of the removal thereof to this court.

WM. M. ECCLES & E. P. JOHNSON,
Att'ys for Pl'ff.

And afterwards, to wit, on the 24th day of March, A. D. 1884, the following further proceedings were had in said cause and appear of record in said court in the words and figures following, to wit:

Order Overruling Motion to Remand.

JAMES MOSHER, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant. } 2313.

Now again come the parties, by their attorneys, and the court, having considered the motion heretofore filed to remand this cause to the State court, orders that said motion be, and the same is hereby, overruled.

18 And afterwards, to wit, on the 18th day of September, A. D. 1884, the following further proceedings were had in said cause, to wit:

Order Sustaining Demurrer to Petition.

JAMES MOSHER
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. } 2313.

The demurrer of defendant to plaintiff's petition came on to be heard on this day, and was argued by counsel and submitted; and the court, having considered the same and being now fully advised in the premises, finds the law on said demurrer for the defendant; and thereupon it is ordered by the court that said demurrer be, and, it is, sustained.

And afterwards, to wit, on the 24th day of September, A. D. 1884 the following further proceedings were had in said cause, to wit:

Amended Petition Filed.

JAMES MOSHER
vs.
ST. LOUIS, IRON MT. & SOUTHERN RAILWAY CO. } 2313.

Now comes plaintiff, by his attorney, and by leave files amended petition herein with exhibit heretofore filed in cause No. 2210.

Said amended petition is in words and figures as follows, to wit:

Amended Petition.

UNITED STATES OF AMERICA, *Eighth Judicial Circuit:*

In the Circuit Court of the United States for the Eighth Judicial Circuit. September Term, 1884.

JAMES MOSHER, Plaintiff,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

19 Eighth judicial circuit, eastern district of Missouri.

Plaintiff, by leave of court, files this amended petition, and states that defendant is a corporation organized under the laws of the State of Missouri and is a common carrier of passengers for hire on a railway owned and operated by it, which said railway starts at a point in the city of St. Louis and State of Missouri and runs from said point into and through the State of Arkansas.

Plaintiff further states that on the 9th day of April, 1883, at the city of St. Louis, in said State, the defendant, for and in consideration of the sum of twenty-eight dollars to it paid by this plaintiff, sold and delivered a ticket to and entered into a contract with this plaintiff, which contract was embodied in said ticket, whereby it agreed to transport and cause to be transported on its said railway

and a line of railway connecting therewith this plaintiff as a first-class passenger from said city of St. Louis to Hot Springs, Arkansas, and return therefrom to said city of St. Louis, and whereby plaintiff was entitled to be safely and expeditiously carried as a first-class passenger to and from said points on said railway and line connecting therewith, and defendant issued and delivered to plaintiff said ticket containing said contract bearing that date, which is herewith filed, providing for and entitling plaintiff to transportation to said Hot Springs and return on its said railway and line of railway connecting therewith, in which said ticket there are the following provisions:

"4th. That it is good for going passage only five (5) days from date of sale as stamped on back and written below.

20 "5th. That it is not good for return passage unless the holder indentifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs railroad at Hot Springs, Ark., within eighty-five (85) days from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date.

"6th. That I, the original purchaser, hereby agree to sign my name and otherwise identify myself as such whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void."

That said date of sale was stamped on the back of and written below the provisions in said ticket, and there were attached to said ticket various coupons, which were a part thereof, and a portion of which entitled plaintiff to be carried from Malvern, in the State of Arkansas, to Hot Springs, in the latter State, and return on the Hot Springs railroad aforesaid; that plaintiff, in accordance with said ticket, was transported as a passenger from said city of St. Louis to said Hot Springs; that plaintiff, within eighty-five days from the aforesaid date of purchasing said ticket from and entering into said contract with defendant, being desirous of returning to said city of St. Louis, presented himself and said ticket at the business and ticket office and depot of said Hot Springs railroad, the said business and ticket office and depot being then and there the business office of the authorized agent of said Hot Springs railroad at said Hot Springs, during business hours and a reasonable time before the time of departure of its train for St. Louis; that plaintiff desired to take and did take and was ready and willing and then and there offered to

21 identify himself as the original purchaser of said ticket to the satisfaction of and to the authorized agent of said Hot Springs railroad at said Hot Springs, Arkansas, for the purpose of entitling himself to return thereon to said city of St. Louis and of permitting the same to be officially signed and dated in ink and duly stamped by said agent, and in all manner fully complied with the terms of said ticket on his part; but the defendant and said Hot Springs railroad failed to have said agent present then and there at said business office of said authorized agent of said Hot Springs rail-

road at any time between the time plaintiff so presented himself and said ticket at said business office of said authorized agent at Hot Springs and the time of the departure of the train that plaintiff desired to and did take going to St. Louis aforesaid from that point, whereby said defendant and its agent and the agent of said Hot Springs railroad at Hot Springs, Arkansas, failed and refused, without any just cause or excuse, to identify plaintiff as the original purchaser of said ticket, or to officially sign, date in ink, and stamp said ticket.

Plaintiff further states that in pursuance of said ticket and contract and tender of performance of the condition of said ticket on his part as aforesaid he boarded the train of said Hot Springs railroad at said Hot Springs and was transported thereby to said Malvern, on the line of defendant's railway, where he boarded a regular passenger train of defendant, on its line of railway going to St. Louis, within eighty-five days from the date of entering into said contract with defendant and the purchase of said ticket and on the same day that this plaintiff presented said ticket at the business office of the authorized agent of said Hot Springs railroad at said Hot Springs, Arkansas, and fully performed the condition thereof
22 on his part as aforesaid; that the conductor, who was then and there the agent and employee of defendant in charge of said passenger train of defendant on its line of railway as aforesaid, demanded fare of this plaintiff, and plaintiff then and there presented said ticket to said conductor and informed said conductor of his presentation of said ticket at the business office of the authorized agent of said Hot Springs railroad at Hot Springs, Arkansas, and of the readiness and willingness and offer of this plaintiff then and there to identify himself to the satisfaction of and to the authorized agent of the Hot Springs railroad at his business and ticket office at said Hot Springs, Arkansas, during business hours and a reasonable time before the time of departure of its train for St. Louis; that plaintiff desired to and did take, and that there was no such agent at said business office at said time of presentation or between that time and the departure of said train as aforesaid to identify plaintiff as the original purchaser thereof or officially sign, date in ink, and duly stamp said ticket, and plaintiff then and there offered to sign his name and otherwise identify himself as the original purchaser of said ticket to said conductor, and then and there demanded of said conductor that he be permitted to proceed on said train to said city of St. Louis as a passenger by virtue of said ticket, but that said conductor in charge of said train of defendant and acting in the capacity of agent and employee of defendant, unmindful of his duties in that respect and the rights of this plaintiff, did wilfully and maliciously, and without any just cause or provocation, refuse to permit plaintiff to sign his name or otherwise identify himself to
him, said conductor, as the original purchaser of said ticket,
23 and did refuse to allow this plaintiff to proceed on said train by virtue of said ticket, and did assault and beat this plaintiff, and did, with force and violence, put him off said train at Bryant's station, in the State of Arkansas, on the line of defendant's railway,

about the hour of noon on the 9th day of May, 1883, where he was compelled to remain until midnight of the same day in order to proceed on his journey to St. Louis; that there was no hotel or other place of accommodation at the latter place in which plaintiff could take shelter and be comfortable, and the night was cold and rainy, and a heavy hail storm fell during the early part of said night, and plaintiff was compelled to and did remain, during the greater part of said night, without fire or other means of protecting himself against cold in the depot of defendant at the latter point for the purpose of taking and did take the midnight train of defendant at the latter point and proceed to St. Louis, as he originally designed, first paying as fare the sum of fifteen and $\frac{39}{100}$ dollars between the latter points.

Plaintiff says further that he was made sick by said exposure and confined to bed by reason thereof for one week thereafter and has not yet entirely recovered; by reason of each and all of which wrongful and unlawful acts aforesaid of defendant, its agents and employees, plaintiff says he has been damaged in the sum of ten thousand dollars, for which he asks judgment.

WILLIAM M. ECCLES AND
E. P. JOHNSON,
Attorneys for Plaintiff.

24 The ticket referred to in the amended petition is in words and figures as follows, to wit:

Issued by St. Louis, Iron Mountain & Southern Railway Co. Good for one first-class passage to Hot Springs, Ark., and ret'n when officially stamped on back hereof and presented with coupons attached.

Tourist's Contract.

In consideration of the reduced rate at which this ticket is sold I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried as follows, to wit:

1st. That in selling this ticket the St. Louis, Iron Mountain & Southern R'y Co. acts only as agent, and is not responsible beyond its own line.

2d. That this ticket is not transferable, and no stop over at an intermediate point will be allowed unless specially provided for by the local regulations of the line over which it reads.

3d. That any alteration whatever of this ticket renders it void.

4th. That it is good for going passage only five (5) days from date of sale as stamped on back and written below.

5th. That it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the anthorized agent of the Hot Springs railroad at Hot Springs, Ark., within eighty-five (85) days from date of sale, and when officially

signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date.

6. That I, the original purchaser, hereby agree to sign my name and otherwise identify myself as such whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void.

7th. That baggage liability is limited to wearing apparel not exceeding $100 in value.

8th. That the coupons belonging to this ticket will not be received for passage if detached.

9th. That my signature shall be in manuscript and in ink.

10th. That unless all the conditions on this ticket are fully complied with it shall be void.

11th. That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by any employee of said lines.

12th. And it is expressly agreed and understood by me that no agent or employee of any of the lines named in this ticket has any power to alter, modify, or waive in any manner any of the conditions named in this contract.

Signature, James Mosher.
Witness, Thos. Johnson, ag't.
Date of sale, Ap'l 9th, 1883.

F. CHANDLER,
Gen'l Pass'r & Ticket Ag't.

Issued by St. Louis, Iron Mountain & Southern railway.

St. Louis, Iron Mountain & Sou. R'y.

One first-class passage.

Malvern to — (station stamped on back).

On conditions named in contract.

No stop over allowed.

This check is not good if detached.

S. L., I. M. & S., H. S.

1292.

Form T, 131.

Hot Springs and return.

26 Endorsed on the back of said ticket is the following, to wit:

Agent of the Hot Springs railroad will stamp in space below.	Agent of St. Louis, Iron Mountain & Southern railway will stamp in space below.
	In compliance with my contract with the St. Louis, Iron Mountain & Southern R'y and lines over which this ticket reads I hereby subscribe my name as the original purchaser of this ticket.
	---------- *Agent Hot Springs Railroad.*
	Witness:

	Dated Hot Springs, Ark., —, 188–.
	[Stamped:] Union Depot Co. Apr. 9, 1883. St. Louis, Mo.

27 And afterwards, to wit, on the 2nd day of October, A. D. 1884, the following demurrer to amended petition was filed in said cause, to wit:

Demurrer to Amended Petition.

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

In the Circuit Court of the United States for the Eastern District of Missouri. September Term, 1884.

JAMES MOSHER, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Now comes defendant and demurs to the amended petition in the above-entitled cause for the following reasons:

1st. Because said amended petition fails to state facts sufficient to constitute a cause of action.

2nd. Because the said amended petition shows on its face that plaintiff failed to comply with the contract set out in the petition, and shows no sufficient reason why said plaintiff did not attempt to comply with the condition in said contract set out in the petition, requiring said plaintiff to identify himself to the authorized agent of the Hot Springs Railroad Company, at Hot Springs, Arkansas, and sign his name to said contract.

3rd. Because the gravamen and gist of the cause of action attempted to be set out in said amended petition was the ejecting said plaintiff from the train of defendant by the said conductor of said

train, and the said amended petition shows that such action on the part of said conductor was done for the reason and upon the ground that the plaintiff presented to said conductor as containing
28 his sole right to ride on said train as a passenger an irregular, improper, and invalid ticket, which, under the law and by the express terms of contract set out in said ticket, did not authorize said plaintiff to ride as passenger on said or any train of defendant.

4th. Because the only excuse or reason plead in said amended petition by plaintiff to justify his claim to use said invalid ticket and to present the same to the said conductor as evidence of his right to ride thereunder was the failure of the authorized agent of the Hot Springs Railroad Company to be present at his office in said depot of said last-named company, in the town of Hot Springs, at the time that said plaintiff got upon the train of said Hot Springs railroad so as to enable him to identify himself to such agent, and that the only notice that said conductor had or received of the alleged failure of said authorized agent of the said Hot Springs and of the alleged inability of said plaintiff in consequent thereof to comply with the requirements of the said contract was from the declarations and statements of said plaintiff which under the law said conductor could not receive and was not bound to receive.

BENNETT PIKE,
Attorney for Defendant.

And afterwards, to wit, on the 20th day of March, A. D. 1885, the following further proceeding were had in said cause and appear of record in words and figures as follows, to wit:

Order Sustaining Demurrer to Amended Petition and Decree.

JAMES MOSHER, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant. } 2313.

Now come the parties, by their respective attorneys, and the court, having considered the demurrer of the defendant to
29 the petition of plaintiff and being fully advised in the premises, finds the law thereon for the defendant and orders that said demurrer to petition be, and the same is hereby, sustained, and that judgment be entered herein for the defendant; and the plaintiff declining to further plead—

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, The St. Louis, Iron Mountain and Southern Railway Company, go hence without day and have and recover of the plaintiff, James Mosher, its costs herein expended, and that a free bill or execution issue therefor.

And afterwards, to wit, on the 22 day of May, 1855, the following further proceedings were had in said cause and appear of record in words and figures as follows, to wit:

Writ of Error Allowed. Citation Signed.

JAMES MOSHER, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Defendant. } 2313.

Now comes the plaintiff, by his attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at said Supreme Court, at the next term thereof, to be begun and held at the city of Washington on the second Monday of October next; which said writ of error is allowed, and said citation signed by the judge.

And afterwards, to wit, on the 1st day of June, 1885, the following further proceedings were had in said cause and appear of record in words and figures as follows, to wit:

30 *Bond Approved and Filed.*

JAMES MOSHER, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO., Defendant. } 2313.

Now comes the plaintiff, by attorney, and presents to the court his appeal bond in the sum of five hundred dollars; which bond is approved and ordered to be filed.

Said bond is in the words and figures following, to wit:

31 *Bond.*

Know all men by these presents that we, James Mosher, as principal, and Flora E. Mosher, George W. Campbell, and *and* Arthur Mittelberg, are held and firmly bound unto the St. Louis, Iron Mountain and Southern Railway Company in the full and just sum of five hundred dollars, to be paid to the said St. Louis, Iron Mountain and Southern Railway Company or its assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at the March term of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between James Mosher, plaintiff, and the St. Louis, Iron Mountain and Southern Railway Company, defendant, judgment was rendered against the said James Mosher, and the said James Mosher having obtained a writ of error of the said court to

reverse the judgment in the aforesaid suit, and a citation directed to the said St. Louis, Iron Mountain and Southern Railway Company citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said James Mosher shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

JAMES MOSHER. [SEAL.]
FLORA E. MOSHER. [SEAL.]
GEO. W. CAMPBELL. [SEAL.]
ARTHUR MITTELBERG. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

32 [Endorsed:] No. 2313. United States circuit court, eastern district of Missouri. James Mosher, pl'ff in error, *vs.* The St. Louis, Iron Mountain and Southern Railway Company, def't in error, Bond, $500. James Mosher, principal, Flora E. Mosher, George W. Campbell, and Arthur Mittelberg, sureties. Filed 1st day of June, 1885. A. P. Selby, clerk.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Geo. W. Campbell, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides in the city of St. Louis, Missouri, and is worth, over and above all his debts and liabilities, the sum of five thousand dollars, and that he owns real estate to that amount, subject to execution, within the eastern district of Missouri.

GEO. W. CAMPBELL.

Subscribed and sworn to by said Geo. W. Campbell, the above-named affiant, this 28th day of May, A. D. 1885, before me, at office, in the city of St. Louis.

A. P. SELBY,
Clerk U. S. Cir. Court, E. Dist. Mo.

33 Upon the hearing of said cause the following opinion was rendered by the court, to wit:

34 In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1885.

JAMES MOSHER
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO. } No. 2313.

MARCH 20, 1885.

BREWER, *J.* (orally):

The question in this case has been argued the third time in this court. I do not see that this amended petition changes the substantial facts in any respect. It still appears as heretofore that the plaintiff purchased a ticket, called a round-trip ticket, from here to Hot Springs and return. That ticket contained an express contract, which provided that it should be presented to the station agent at Hot Springs and by him stamped upon the back, after being satisfied that the person presenting it was the person to whom the ticket was issued. It was a limited ticket with special rates. Upon that ticket the plaintiff went to Hot Springs, no objection being made. He was ready to return, but the agent not being present at the ticket office at Hot Springs the ticket was not presented to him, the holder was not identified, nor the ticket stamped by him. With that ticket unstamped, without any identification, the plaintiff started to come back to St. Louis. He rode from Hot Springs to Malvern without objection, but from Malvern, coming this way upon the Iron Mountain road, the conductor objected and refused to take that ticket. The plaintiff was removed from the train, and he brings this action to recover damages for the expulsion.

35 I dissent entirely from the construction placed upon the ticket by counsel at this time, and now for the first time. Heretofore it was conceded that the ticket required upon its face an endorsement stamped by the station agent at Hot Springs. This time counsel seems to claim that it did not require anything of the kind. I think it did. The language is plain. The authorities which have been cited by counsel do not come up to this case, for here when the plaintiff took that ticket he entered into an express contract. It is not a question of implied contract or of rights independent of a contract. The plaintiff took that ticket, signing it at the time he took it, thereby creating an express contract between him and the railroad company, by which the ticket was to be good for a return passage when, and only when, endorsed by the agent at Hot Springs and when the owner and holder had been identified there to his satisfaction. The conductor, when the ticket was presented, saw no stamp upon it. The plaintiff had not been identified and the rules of the company upon him as a conductor required him to remove the party unless he paid his fare. Now, can it be said that the railroad company is responsible because the conductor did that which by the rules of the company, reasonable rules, too, in pursuance of his duty, he ought to have done? Grant that there

was an implied contract that the station agent should have been at Hot Springs depot, if the plaintiff had sued for a breach of that contract and had asked the amount which he was compelled to pay in order to purchase a return ticket, then a very different question would have arisen; but here he relies on the fact that the expulsion from the train was unlawful because the conductor ought to have taken his statement instead of that evidence which was
36 provided by the contract, viz., identification and the stamp of the agent at Hot Springs.

It certainly would introduce a very uncertain rule of procedure if a conductor could not rest upon the faith of the ticket which is presented to him, if he is bound to act as a judicial tribunal, and take testimony and inquire into the excuses or reasons for the non-perfection of a ticket which is presented to him. The party took the ticket, upon the face of which was the express stipulation that before it should be good for a return passage the holder should be identified by the agent at Hot Springs, and he should stamp that ticket on the back. Now the party says, "Why I wanted to prove to the railroad conductor that I was the man, the party who took that ticket in the first instance." Can the courts cast upon the conductor the duty of entering upon a judicial investigation? Of course the conductor could not at the instant secure counter-testimony, and he would be bound to take the statement of the party as to the facts of the case independent of the express language of the ticket. I do not think that the conductor is bound to do anything of the kind. I think he has a right to rely upon the language of the contract as expressed in the ticket. If the party was injured by the negligence or wrong of somebody else, he should have paid his fare back and then sued to recover the amount which he had been compelled to pay, owing to the omission, negligence, or misconduct of the agent at Hot Springs.

As I said, this is the third time this question has been presented by demurrer, and while the petition has been changed from time to time, yet the substantial facts still remain to-day as they were in the first instance.

37 The demurrer will be sustained.

The party of course will have his exceptions; judgment will be found for the defendant, and as the *ad damnum* clause is over $5,000 he can take it to the Supreme Court of the United States, and there settle the question which by it has not yet been determined definitely. It has been determined one way and another by the courts of the different States, but the question whether the conductor is justified in acting on the letter of the ticket presented to him, or is bound to take the statement of the passenger as to matters concerning which the ticket makes express provision, and whether, if he mistakes, the company is responsible, has not yet been settled by the Supreme Court of the United States, but can be settled in this case if the plaintiff desires.

The demurrer will be sustained and judgment entered for the defendant.

38 THE UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true and complete transcript of the record and proceedings in case No. 2313, of James Mosher, plaintiff, against the St. Louis, Iron Mountain & Southern Railway Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 23d day of June, in the year of our Lord eighteen hundred and eighty-five.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2313. United States circuit court, eastern district of Missouri. James Mosher against St. Louis, Iron Mountain and Southern R'y Co. Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 246. James Mosher, plaintiff in error, *vs.* The St. Louis, Iron Mountain and Southern Railway Company. Filed July 13, 1885.

38 THE UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true and complete transcript of the record and proceedings in case No. 2313, of James Mosher, plaintiff, against the St. Louis, Iron Mountain & Southern Railway Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 23d day of June, in the year of our Lord eighteen hundred and eighty-five.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2313. United States circuit court, eastern district of Missouri. James Mosher against St. Louis, Iron Mountain and Southern R'y Co. Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 246. James Mosher, plaintiff in error, *vs.* The St. Louis, Iron Mountain and Southern Railway Company. Filed July 13, 1885.

127-390

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 246.

JAMES MOSHER, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

IN ERROR TO THE CIRCTIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

CLINTON ROWELL,

Attorney for Plaintiff.

In the Supreme Court of the United States. October Term, 1887.
No. 246.

JAMES MOSHER, Plaintiff in Error,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Brief for Plaintiff in Error.

This is an action for damages instituted by the Plaintiff in Error in the Circuit Court of Jefferson county, in the State of Missouri, from which it was removed to the Circuit Court of the United States for the Eastern District of Missouri, by the Defendant in Error, on the grounds that the matter in dispute, exclusive of costs, exceeded the sum of $500, and that the controversy was between citizens of different States. After said removal a motion was made by the Plaintiff in Error to remand the cause to said State court, which was overruled. The Defendant in Error then filed a demurrer to the original petition in the cause, which the court sustained, and the Plaintiff in Error, by leave of court, filed an amended petition in the cause.

The amended petition states in substance that plaintiff purchased a ticket (containing a contract) of defendant, a railway corporation, on the 9th day of April, 1883, entitling him to be carried as a first-class passenger from St. Louis to Hot Springs and return, on defendant's line of railway, and another line, the ticket to be good for going passage only five days from date, and not good for return passage unless the holder identified himself as the original purchaser of the ticket, to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Arkansas, within eighty-five days from date of sale, and when officially signed and dated in ink and duly stamped by said agent, to be good only five days from such date, and that plaintiff agreed to sign his name as the original purchaser of said ticket and otherwise identify himself as such, whenever called upon to do so, by any conductor or agent of either of said lines, and on his failure or refusal to do so, that the ticket should become thereafter void. That plaintiff was transported to Hot Springs on the same, and desiring to return to St. Louis, he presented himself and said ticket, on the 9th day of May, 1883, within the time limited, at the business office of the authorized agent of the Hot Springs Railroad, at Hot Springs, who was also the agent of defendant, during business hours, and a reasonable time before the time of the departure of the train he desired to and did take, and offered to sign his name, identify himself, &c., as required, and fully performed all of the duties devolving on him, but that said agent was not at his office to perform his duties at any time between the time plaintiff so presented himself and said ticket, and the departure of the train that plaintiff took, and was transported by virtue of said

ticket to the line of defendant's railway, where, within the time limited (and on the same day that he presented said ticket at the business office of the agent of the Hot Springs Railroad) he boarded a regular passenger train of defendant for St. Louis, and when the conductor of the latter train called on him for fare, he presented said ticket to him, informed him of the presentation of the same at Hot Springs and his offer to sign his name, &c., as stated, and of the absence of the agent, and offered to sign his name, identify himself, &c., to said conductor, and demanded to be transported to St. Louis, by virtue of said ticket, which the conductor refused to do, and put him off the train (that he then took the midnight train of defendant and went to St. Louis, first paying as fare therefor the sum of $15.30); to his damage, &c. (Printed pp. 13 to 16 of record.)

The amended petition was demurred to on the grounds that it did not state facts sufficient to constitute a cause of action, and that it showed affirmatively that plaintiff had no cause of action. (Pp. 18 and 19 of printed record.) This demurrer the court sustained, and the plaintiff declined to further plead, and the court rendered judgment for the defendant. (P. 19 of said record.) Plaintiff thereupon presented to the court a writ of error (p. 2 of said record) in the cause, to remove the same to this court, a citation to the defendant, signed by the judge, to appear in this court, with a waiver of service thereof by defendant's attorney (p. 3 of said record), a bond in the cause approved by the judge (pp. 20 and 21 of said record), which said writ of error was allowed by the court (p. 20 of said record), and in obedience to the command of said writ of error the clerk of the court transmitted to this court a duly certified transcript of the record and proceedings in the cause. Attached to said transcript is an assignment of errors in the cause, alleging as errors the following:

1. That the demurrer to the amended petition, and the matters therein contained, are not sufficient in law for the defendant to have or maintain a defense to the action.

2. That said demurrer was sustained and judgment given for the defendant, whereas, by the law of the land, it ought to have been overruled and judgment given for the plaintiff.

3. That the court erred in sustaining said demurrer.

A prayer for reversal follows. (P. 1 of said record.)

Points and Authorities.

1. The ticket of plaintiff was a round trip ticket, good going and returning, containing no condition precedent but a condition subsequent, a clause of forfeiture, that was never violated by plaintiff.

2. The petition shows that Plaintiff in Error complied strictly on his part with every requirement contained in his ticket, by presenting the same at the proper time and place designated therein, for the purposes required thereby, and Defendant in Error was bound by reason thereof to comply with it also, and return him to St. Louis on the same, notwithstanding it was unsigned and unstamped by the agent.

Gregory *v.* Burlington & Mo. River R. R. Co., 10 Neb., 250.

3. The ticket was good for return passage by its express terms as soon as the holder identified himself as the original purchaser to the agent at Hot Springs, Ark., within eighty-five days from date of sale, and the signature, dating and stamping by said agent were not required to make it good for return passage, and the latter acts, if performed by him, would have limited it to five days thereafter, but if not performed by him the ticket was not only good for return passage but unlimited by its terms, and the language printed on it must be regarded as the language of the defendant, and if of doubtful import should not be solved to the detriment of the passenger.

Auerbach *v.* N. Y. C. & H. R. R. Co., 89 N. Y., 281 on p. 285.

4. The plaintiff agreed to sign his name and identify himself as the original purchaser of the ticket whenever called upon to do so by the conductor or agent, and a failure to do this when so called upon was the only provision in it that rendered it void. This he not only did not fail to comply with, but attempted to perform, and the conductor of defendant refused to permit him to do so, and this provision made it the imperative duty of the conductor to accept the proffered identification, and when made to honor the ticket of plaintiff.

5. The ticket constituted the agent of the Hot Springs Railroad, at Hot Springs, Ark., the agent of defendant for the purposes specified, and his default was the default of defendant.

6. The fact that defendant's agent was not present at the time plaintiff tendered performance did not vitiate his tender.

Parsons on Contracts, 7 ed., vol. 2, bottom p. 786.

7. Under the strictest construction of the terms of the ticket against him, plaintiff was not guilty of any negligence in failing to get it stamped, and the agent of defendant was guilty of negligence that prevented him from doing so, and he was entitled to be transported on it and damages for his ejection.

Gregory *v.* Burlington & Mo. River R. R. Co., 10 Neb., 250.
Murdock *v.* Boston & Albany R. R. Co., 137 Mass., 293.
Moore *v.* Fitchburg R. Corp., 4 Gray, 465.
Marony *v.* Old Colony & Newport R. R. Co., 106 Mass., 153.
Lake Shore & Mich. S. R'y Co. *v.* Greenwood, 79 Pa. St., 373.
Pennsylvania R. R. Co. *v.* Spicker, 105 Pa. St., 142.
Young *v.* Pennsylvania R. R. Co., 115 Pa. St., 112, and 5 Central Reporter, 848.
Hufford *v.* Grand Rapids & Ind. R. R. Co., Mich., and 7 Western Reporter, 859.
Burnham *v.* Grand Trunk R'y Co., 63 Me., 298.
Tarbell *v.* Northern Central R'y Co., 24 Hun., 51.
Hamilton *v.* Third Ave. R. R. Co., 53 N. Y., 25.
Hicks *v.* Hannibal & St. J. R. R. Co., 68 Mo., 329.
Yorton *v.* Milwaukee L. S. & W. R'y Co., 62 Wis., 367.
Palmer *v.* Railroad, 3 S. C., 580.
Ills. Central R. R. Co. *v.* Johnson, 67 Ills., 312.
Chicago & Alton R. R. Co. *v.* Flagg, 43 Ills., 364.
Evans *v.* Memphis and Charleston R. R. Co., 56 Ala., 246.

Lake Erie & Western R'y Co. *v.* Fix, 88 Ind., 381.
St. Louis & South Eastern R'y Co. *v.* Myrtle, 51 Ind., 566.
Kansas Pacific R'y Co. *v.* Kessler, 18 Kansas, 523.
And see Pennsylvania R. R. Co. *v.* Connell, 112 Ills., 295.

And conversely, the innocence of the passenger in purchasing his ticket does not protect him, as where he had paid for it in counterfeit money or purchased it from one who had fraudulently obtained it.

Memphis & Charleston R. R. Co., *v.* Chastine, 54 Miss., 504.
Frank *v.* Ingalls, 41 Ohio St., 560.

8. It was the duty of the conductor of defendant to accept and act upon the statement of plaintiff in regard to his ticket, unless he had ascertained that his statement was untrue.

Hufford *v.* Grand Rapids & Ind. R. R. Co., Mich., ., and 7 Western Reporter, 859.
Burnham *v.* Grand Trunk R'y Co., 63 Me., 298.
Young *v.* Pennsylvania R. R. Co., 115 Pa. St., 172, and 5 Central Reporter, 848.

9. There are no negative words in this ticket in connection with any of its provisions to render it void for a failure to comply with any of them within the eighty-five days limit, excepting the one requiring him to sign his name as the original purchaser of it, and otherwise identify himself as such whenever called upon to do so, by any agent or conductor of either of the lines named in it, and a failure or refusal to do so, when so called upon, is the only cause under it that would have justified the conductor in refusing to accept it from him.

Maples *v.* N. Y. & N. H. R. R. Co., 38 Conn., 557-560.
Post *v.* Chicago & N. W. R. R. Co., 14 Neb., 110.
Pier *v.* Finch, 24 Barbour, 514.
Auerbach *v.* N. Y. C. & H. R. R. Co., 89 N. Y., 281-285.

10. But if there had been such negative words in each provision of it, it is a matter at least worthy of serious consideration whether the acceptance of this ticket by the Hot Springs R. R. Co., was not a waiver of the right to require a stamp on it by defendant.

Kent *v.* Baltimore & Ohio R. R. Co., Ohio St., , and 10 Western Reporter, 457.

11. The petition in this cause was drawn in accordance with Sec. 3511 R. S. Mo., 1879, which provides that a petition shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." The petition in this case states the facts, and whether plaintiff is entitled to damages for the failure of the agent at Hot Springs to be at his office and take the identification of plaintiff, and stamp his ticket, or for having been ejected from the train, or for the amount paid defendant for transportation from the point of ejection to his destination, it states a cause of action for damages, and the demurrer to it should not have been sustained.

Clark *v.* Clark, 86 Mo., 114 on p. 124.
Yorton *v.* Milwaukee L. S. & W. R'y Co., 62 Wis., 367 on p. 371.
Bookwalter *v.* Clark, 10 Fed. Rep., 793, on p. 797.
Post *v.* Chicago & N. W. R. R. Co., 14 Neb., 110.
Jerman *v.* Stewart, 12 Fed. Rep., 266 on p. 267.

And see St. Louis & S. E. R'y Co, *v.* Myrtle, 51 Ind., 566, in which a petition almost identical with the one in this cause was sustained, and the company held liable in damages for having ejected a passenger.

12. The decision in case of Mosher *v.* St. Louis I. M. & S. R'y Co., 17 Fed. Rep., 880, is the decision of this case by the court below before the amendment of the petition.

13. There is a class of cases which were relied on by defendant in the court below, but which have no application in this case, to the effect that when a person carelessly or negligently accepts a ticket from an agent over a wrong road or to the wrong station, or a check that does not entitle him to ride on the train he boards, or he boards a train that does not stop at the station where he desires to get off, and the conductor demands fare other than the ticket or check, and is refused, the passenger may be put off the train and the company is not liable in damages for his ejection; but even these cases recognize the liability of the company for the mistake of the agent in selling the ticket or check. Such are the cases of Yorton *v.* Milwaukee L. S. & W. R'y Co., 54 Wis. 234 (but see same case, 62 Wis., 367, virtually overruling the former decision); Bradshaw *v.* South Boston R. R. Co., 135 Mass., 407; Lake Shore & Mich. S. R'y Co. v. Pierce, 47 Mich., 277, (but see Hufford *v.* Grand Rapids & Ind. R. R. Co., Mich., , and 7 Western Reporter, 859, virtually overruling this decision); Cloud *v.* St. Louis, I. M. & S. R'y Co., 14 Mo., App., 136, where the passenger failed to present his ticket for identification and stamping before starting on his return trip, and which is distinguished from the present case by the one of Gregory *v.* Burlington & Mo. River R. R. Co., 10 Neb., 250, where such a ticket was properly presented to the agent and he refused to take the identification and stamp the ticket for reasons that he believed sufficient. In this connection the attention of the court is called to the case of Shelton *v.* Mich. S. & Lake S. R'y Co., 29 Ohio St., 214, which was decided on the ground that the passenger did not have his ticket which had been previously taken up by another conductor for failure to sign it, this case being cited in 88 Ind., 385, and the case in the 29 Ohio St. is met by the one of Maples *v.* N. Y. & N. H. R. R. Co., 38 Conn., 557, where the passenger had his ticket with him but could not find it. In justice to the court below, attention is called to the fact that the case of Gregory *v.* Burlington and Mo. River R. R. Co., 10 Neb, 250, was not before it when the decision herein was rendered.

Argument.

It is believed that the foregoing points and authorities present the case so as to render any extended argument a mere repetition of them and a waste of time of both the court and attorney. The point presented herein was adjudicated in the case of Burlington & Mo. River R. R. Co., 10 Neb., 250, where the holder presented his ticket to the agent and was refused identification and stamp on same, on what the agent believed to be justifiable grounds. This is a much stronger case, as the only excuse for failure in it is the negligence of defendant's agent, and the principle governing it is one of universal application, to-wit: That where one party to a contract performs or tenders performance of his part of it, the other party is liable for the consequences of a failure or refusal to perform his part. Authorities have not been cited on this broad, general proposition, but instead thereof there is collected, under point 7, the authorities especially applicable to common carriers of passengers, and which establish the following propositions:

1. If a person holding a ticket that requires identification and stamp by an agent to make it good for return passage, he fully complies with his contract when he presents the same to such agent, and is entitled to return on it, although the agent refuses to take his identification and stamp it, for reasons he believes to be sufficient.

2. That if the ticket agent sells a ticket that does not disclose on its face to what point the ticket is good, and assures the purchaser that it is good to a certain point, the company is bound by this representation of the agent.

3. If the agent of a company directs a passenger holding a ticket to take a certain train, for the station called for in his ticket, the company is bound to let him off at that station; and the same is true when the ticket is sold as being good for the station named in it on a particular train; or where the wrong end of a round trip ticket is returned to a passenger, who supposes it to be good for return passage.

4. If a ticket is sold, unlimited on its face, a purchaser without notice is entitled to use it as such.

5. If a passenger receives, in exchange for his ticket, what is represented and he believes to be a stop-over check, he is entitled to be transported on it; and this is true also where he is assured by the agent of the company that he can stop-over on his ticket, notwithstanding his ticket calls for a continuous passage; and where the passenger had been transferred to another car and was not furnished with evidence of his right to ride on it.

6. If a company permits passengers to ride on a freight train by providing themselves with tickets, it must keep its ticket office open at train-time, or the conductor must receive fare of them on the train when tendered, and transport them.

In all of these enumerated cases, conductors have, under the rules of their respective companies, innocently violated the various rights, as therein specified, of different passengers, and in each case the company was held liable for his act, in damages; and the case at bar is believed to be fully within the principles settled by these adjudica-

tions, even if every provision of the ticket of plaintiff should be construed most strictly against him.

It is not deemed necessary or desirable to review the cases cited, separately, or at all, as it will be found that the cases of Gregory *v.* Burlington & Mo. River R. R. Co., 10 Neb., 250. Murdock *v.* Boston & Albany R. R. Co., 137 Mass., 293. Young *v.* Pennsylvania R. R. Co., 115 Pa. St., 112, and 5 Central Reporter, 848, and Hufford *v.* Grand Rapids & Ind. R. R. Co., Mich., , and 7 Western Reporter, 859., cited under point 7, are the latest and leading cases on the question, and substantially embody the doctrines of the other cases on that point. The cases cited under the other points sustain those points respectively, and are not so numerous as to require that special attention be directed to any of them by digesting them.

In conclusion, it is submitted that the enforcement of any other rule in this case than the one contended for, would make an exception to the rules governing the enforcement of contracts, in favor of a common carrier of passengers, not recognized in any other business, and one in which the utmost good faith on the part of the common carrier is required both by law and public policy, as the violation of such a contract may be and often is, peculiarly embarrassing and damaging, occurring at times when the passenger is far from both home and friends, and without means of reaching either or of obtaining legal redress; and to say to plaintiff that he could have remained in Hot Springs, Ark., until he found the agent of the Hot Springs Railroad, and obtained his signature and stamp on this ticket, would be to substitute the right of defendant, through its agent, to violate its contract, for the legal right of plaintiff, as held in the cases cited, to insist upon the performance of its contract by defendant; and what necessity, if any, compelled the plaintiff to start on his return trip when he did, it is unnecessary to inquire, as it was his legal right to do so, and the defendant could not prevent him from doing so by an implied refusal to take his identification and stamp his ticket, caused by the negligence of its agent, or an express refusal of such agent even on supposed justifiable grounds.

Respectfully submitted.

Attorney for Plaintiff in Error.

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Office Supreme Court U. S.
FILED.
APR 20 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 246.

JAMES MOSHER,

Plaintiff in Error,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

BRIEF FOR THE DEFENDANT IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE, JR.,
Of Counsel.

BURGOYNE QUICK PRINTING CO., Cor. Walker & Centre Sts., New York.

Supreme Court of the United States,

OCTOBER TERM, 1887.

JAMES MOSHER,
Plaintiff in Error,

AGAINST

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

No. 246.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement.

The plaintiff, Mosher, sued the Railway Company for damages for having been ejected from its train, at a point called Bryant's Station, in Arkansas, on May 9th, 1883. The cause was begun in the Circuit Court of Jefferson County, Missouri, and was removed to the Circuit Court of the United States for the Eastern District of Missouri. The defendant demurred to the plaintiff's original petition (Record, p. 11). The demurrer was sustained (Record, p. 13). An amended petition was filed by leave of Court, and it is from the

judgment sustaining defendant's demurrer to the amended petition that this writ of error is prosecuted.

The facts are these: In April, 1883, the plaintiff purchased from the defendant company a special excursion ticket between St. Louis and Hot Springs, Arkansas (see copy ticket, as filed with petition, Record, pp. 16–18), the ticket containing the following provisions, among others:

> "1st. That in selling this ticket the St. Louis, Iron Mountain and Southern R'y Co. acts only as agent, and is not responsible beyond its own line.
>
> * * * * * * *
>
> "4th. That it is good for going passage only five (5) days from the date of sale as stamped on back and written below.
>
> "5th. That it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad, at Hot Springs, Ark., within eighty-five (85) days from the date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date"
>
> "6th. That I, the original purchaser hereby agree to sign my name and otherwise identify myself as such whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void.
>
> * * * * * * *
>
> "14th. And it is expressly agreed and understood by me that no agent or employee of any of the lines named in this ticket has any power to alter, modify or waive in any manner any of the conditions named in this contract." (Record, pp. 16, 17).

To these conditions the plaintiff agreed in writing, and subscribed the agreement (Record, pp. 16, 17).

This special contract is set forth in the complaint as the ground of action, and its validity is not questioned. On the contrary, it is affirmed by being made the basis of the cause of action set forth in the petition and amended petition.

The plaintiff used the ticket to Hot Springs, and about a month subsequently, desiring to return to St. Louis, he presented himself at the depot, which was the office of the agent of the Hot Springs Railroad, for the purpose of identifying himself and of having the ticket signed, dated and stamped according to its conditions; but the agent was not present at the depot between the time that the plaintiff presented himself and the time of the departure of the train which he desired to take. (How much time elapsed is not stated. The petition describes it as a "reasonable time"). The plaintiff thereupon boarded a regular passenger train of the Hot Springs Railroad and was carried to a place called Malvern, the point of junction with defendants' line of railway, where he boarded a regular passenger train of defendant. The defendants' conductor in charge of this train demanded fare of the plaintiff. The latter presented the ticket above described and offered verbal explanations and declarations to the effect that he had made an effort to identify himself to the agent of the Hot Springs Railroad and to have the ticket signed, dated and stamped, but that he had been prevented from doing so by reason of the absence of the agent from his office. The conductor declined to accept these explanations as a substitute for a valid ticket, and the plaintiff refusing to pay fare, he ejected him from the train at the station named. To the amended petition stating facts, of

which the foregoing is the substance, the defendant demurred upon the general ground of insufficiency and also upon the grounds that the petition shows on its face a failure of the plaintiff to comply with the conditions of his contract with the defendant; that the petition shows that the gravamen of the cause of action was the ejecting of the plaintiff from the train, and that the conductor's action in this respect was taken because the plaintiff presented to the conductor, as containing his sole right to ride upon the train, an irregular and invalid ticket which under the law and by the express terms of the contract set out in the ticket did not entitle the plaintiff to ride on any train of the defendant. That the petition showed that the only claim of the plaintiff to so ride lay in his verbal explanations and declarations, which the conductor could not and was not bound to receive.

ARGUMENT.

The plaintiff presented to the conductor, as the sole evidence of his right to ride on the train of the defendant, a ticket which upon its face disclosed the failure of the plaintiff to entitle himself, under the terms of his written contract, to the transportation which he demanded. The ticket, as presented was a contradiction of his claim to transportation. It was a special excursion ticket, sold at special rates (Record, pp. 16–18) and contained a condition of validity for return passage, to which the plaintiff had subscribed and by which he was bound. The state of the ticket as presented—undated, unsigned and unstamped by the agent mentioned in it—showed that this condition had

not been performed, and that the ticket had never become valid for the carriage which the plaintiff demanded.

It is, we submit, entirely immaterial to this case whether or not the plaintiff presented himself at the office of the Hot Springs Railroad agent; whether or not the plaintiff was there, for a time, ready and willing and offering to identify himself; whether or not the agent of the Hot Springs Railroad can, in any aspect of the case, be regarded as the agent of the defendant.* All these inquiries we believe to be entirely aside from the issues of this case. The only question here presented is whether a railway conductor is required to accept, from a passenger verbal explanations to supplement a defective ticket, or verbal declarations in lieu of a valid ticket.

The failure of the Hot Springs Railroad agent to afford plaintiff an opportunity to validate his ticket for a return passage may have involved a breach of an implied

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*NOTE.—Whatever may be the doctrine of law, in ordinary cases, as to the responsibility of a railroad company, beyond its own line, upon a ticket sold by it and covering carriage over other lines; it seems clear that no doubtful question is presented in the present case. By an express stipulation of his contract the plaintiff agreed "to and with the several companies over whose lines this ticket entitles me to be carried, as follows, to wit:

"1st. That in selling this ticket the St. Louis, Iron Mountain & Southern R'y Co. *acts only as agent and is not responsible beyond its own line.*"

Although, for reasons stated, we do not deem it important to contend upon this point; yet it must be clear that the Hot Springs Railroad agent could, in no event, be regarded as the agent of the defendant, so that the consequences of his default could be visited upon it, for, we submit, that the plaintiff is absolutely concluded by the express terms of his contract,—a contract which it was entirely competent for him to make and upon which he sues,—from setting up such a claim.

Post, pp 22, 23.

undertaking for which plaintiff could recover in an action upon that breach. But it seems much too clear to require argument, that such a failure on the part of this agent (even regarding him as an agent of defendant) did not put plaintiff in possession of a right to take or appropriate carriage in violation of the reasonable rules of the company and in disregard of the conditions of his contract. The default (if there was any default) was in omitting to afford the plaintiff an opportunity to validate his ticket. It did not lie in the conductor's refusal to accept an invalid ticket. The failure to afford plaintiff this opportunity may have resulted in a denial to him of the evidence of right to transportation without payment of further fare ; but the plaintiff did not thereby become entitled to demand more than reparation for this denial of right; including recovery of the amount of further fare paid. It was clearly the duty of the plaintiff before insisting upon an affirmative right to return passage to perform the condition which entitled him to that right. For any unusual or extraordinary inconvenience or delay in securing the right, he would perhaps be entitled to compensation from the party whose omission occasioned the inconvenience or delay. Or if it became necessary for the plaintiff to proceed without the performance of the condition (performance then being impossible through the default of another), he could fix the party in default with liability for breach of its contract by a tender of performance of the condition and hold the party for such damages as he sustained through being compelled to proceed independently of contract. A readiness and willingness to perform, or a tender of performance, affords merely

the negative protection secured by fixing the responsibility for breach upon the other party. It does not create a right to treat the condition as performed for the purpose of forcibly appropriating rights which only come into existence upon performance of the condition. Breach having been fixed by tender and failure to accept performance of the condition, the contract is at an end and no longer exists except as a title paper to damages. Further proceedings are taken independently of contract, and they relate to the contract only as their expense, inconvenience and general incidents are elements in determining the measure of damages.

In this case the plaintiff alleges an unaccepted tender of performance, not as a pre-requisite for suit upon the breach thus fixed, but as entitling him to undertake his own redress, to fix his own measure of damages, and to take a ride to St. Louis, without subjection to the regulations of the company, as liquidated damages.

In the Pennsylvania Company vs. Hine, 41 Ohio St., 276, the facts were these:

The plaintiff at Toledo bought of defendant (acting for itself and other companies) a ticket good for passage to Washington, D. C., and return, but so limited as to expire with the 10th day of March, 1881. He left Washington in time to arrive in Toledo before midnight of that day by making schedule connections at Pittsburgh, but, without his fault, his train did not arrive in Pittsburgh (from which point defendant's road extended westward), until after defendant's connecting train had started for Toledo. He entered a later train early on the morning of March 11th, tendered to its conductor the last coupon of the ticket, and told him of the delay and its cause. Upon refusal to pay fare he was removed from the train.

The Court held: "The removal of H. from the train was a proper exercise by the conductor of the right of

defendant, and for that removal it was not liable to damages. If the defendant was liable for breach of contract because the train east of Pittsburgh was so delayed that H. could not enter the train upon which his ticket gave him a right to ride, *that liability did not confer upon H. a right to ride upon the train from which he was removed.*"

As was said in the case of Bradshaw against South Boston R. R. Co., 135 Mass., 407, " if the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way."*

The law of reason, common sense and business necessity may be as conclusively applied to the case. The learned Judge who decided this case below (Judge BREWER) says :

" It certainly would introduce a very uncertain rule of procedure, if a conductor could not rest upon the faith of the ticket which is presented to him, if he is bound to act as a judicial tribunal, and take testimony and inquire into the excuses or reasons for the non-perfection of a ticket which is presented to him."

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* NOTE.—This case was an action in tort for expulsion from one of defendant's cars. The defendant controlled different lines of street railway, and it was its practice to give passengers transfer checks. The plaintiff was familiar with the practice and with the character and appearance of the checks used. He paid his fare on the defendant's road, including a sufficient amount to entitle him to a transfer check for carriage over another of its lines. He stated to the conductor which line he wished to take, and as he left the car the conductor handed him by mistake a wrong check. The check was tendered to the conductor of a car on the second line and was refused on account of its irregularity. The plaintiff refusing to pay fare was ejected from the car. A further extract from the opinion of the Court will be found at p. 19 in the Appendix to this brief.

In the case of Frederick vs. Marquette, Houghton & Ontonagon Ry. Co., 37 Mich., 342, the Court by Judge MARSTON says :

"How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company, when a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposing party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, when no such safeguards could be thrown around it, and when the conductor at his peril would have to accept the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood; and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. *There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger and the rights of the latter to travel the ticket produced must be conclusive evidence, and he must produce it when called upon as the evidence of his right to the seat he claims.*"

To the same effect is the case of L. S. & M. S. R. R Co. vs. Pierce, 47 Mich., 277.

Every contract will be read and construed as including within its terms a covenant to regard and comply with the usual and rational requirements which, within judicial knowledge and common experience, pertain to the thing to be done. It was as much a covenant of the present contract as if expressed in terms, that the

plaintiff would demand carriage subject to the condition—familiar and notorious in practice, as well as, under the decisions of the Courts, a legal requirement—that he should pay fare or offer a valid and complete ticket. Business necessity sanctions the rule which the Courts have so frequently reiterated.

In the note to the case of *Swan vs. Manchester, &c., Railway Company*, as reported in 6 Am. & Eng. R. R. cases, at page 332, the result of the adjudged cases upon this subject in thus stated:

> "When a passenger has lost his ticket or produces an irregular or improper one, the conductor cannot be expected to listen to explanations upon the subject before acting. Such a rule would be a painful source of vexation and annoyance both to railroad companies and the traveling public."

It seems unneceesary to amplify argument upon this point. The plaintiff has pursued a mistaken course, and has invited the situation upon which he now mistakenly seeks to base an action. If he has a cause of action it is upon the breach of contract involved in the constructive failure to accept his tender of performance of the condition of the ticket;—a cause of action which accrued and became complete immediately upon the failure.

IT WAS SUGGESTED BELOW, on behalf of the plaintiff, that the return carriage over the Hot Springs Railroad to Malvern (the point of junction with defendant's line), without objection to the plaintiff's incomplete ticket, operated to estop the defendant from declining to receive the ticket and carry the plaintiff.

A sufficient reply to this suggestion, if repeated in this Court, may be made in the words of the Court in

Sherman vs. Chicago & N. W. Ry. Co., 40 Iowa, 45, where the attempted use of an expired ticket was considered:

"The fact that he had improperly used the ticket twenty times could work no estoppel upon the defendant, because the ticket itself was express notice to plaintiff and the conductors that the latter had no right to accept the ticket in payment of fare after its expiration, and that it was his duty to pay fare and their duty to take up the ticket and collect the fare. His wrongful conduct twenty times could not make his twenty-first effort rightful. The essential elements of estoppel as against defendant are all wanting."

See also, Dietrich vs. Pa. R. R. Co., 71 Pa. St., 432.

It appears from the opinion of Circuit Judge Brewer that upon the reargument of the case (occasioned by the plaintiff's second amendment after the defendant's demurrers to the original and first amended complaints had been sustained) the plaintiff proposed the theory that compliance with the 5th condition of the ticket was unnecessary or that non-compliance with that condition was cured by the plaintiff's offer to the conductor to sign his name and identify himself (Record, pp. 22, 23, fols. 35, 36). It had been conceded on prior arguments that the conditions of the ticket required an endorsement stamped by the Hot Springs Railroad agent (Opinion, Record, p. 22, fol. 35). The requirement of the ticket upon this point is expressed in plain and unequivocal language as an indispensable condition of validity, which no agent or employee of defendant had the power to modify or waive. The 6th condition reserves to the defendant a separate and independent right to require at any time, through its conductors or agents, *additional identification;* and

the manifest and well known purpose of such a provision is, primarily, to protect the company from a transfer of a special rate ticket *in transitu*. The right thus to require identification to the conductor was as necessary and as available to the company on the outgoing as on the return trip. Of course it cannot be successfully argued that on the return trip the passenger could compel the conductor to exercise a right (which was left by the terms of the contract in the *option of the conductor*) and substitute this compulsory exercise of the conductor's right for a compliance on his (the passenger's) part with an essentially different condition of the contract. It is not worth while to pursue this view, as the requirements of the 5th condition were compulsory upon plaintiff, and he had contracted that compliance on his part should be indispensable to the validity of the ticket; while the requirements of the 6th condition rested in the *option* of the company and the judgment of its agents; the two conditions are in no sense alternative or interdependent. The official signing, dating and stamping of the ticket and the limitation of time thereby fixed (as provided in the 5th condition) could not be dispensed with at the option of the plaintiff, who had agreed in writing that his ticket should have no force or validity until these things were done.

We have, for convenience of reference, collected in an Appendix to this brief a few, among a large number of adjudged cases in which the rule as here presented is laid down with uniformity, and without qualification.

Moreover, the Petition shows no reasonable effort on the part of the plaintiff to perform the condition of the contract.

If inquiry in the line of this proposition may in any aspect of the case be deemed material, it will be obvious upon an examination of the averments of the petition that no facts are stated showing a reasonable effort on the part of the plaintiff to perform the condition upon which he would have been entitled to use the ticket for a return passage. The averment of the petition is that the plaintiff presented himself at the office of the agent of the Hot Spings Railroad, during business hours, and a "*reasonable time*" before the departure of the train which he desired to take (Record, p. 14, fol. 21). "Reasonable time" is a term of indefinite import. It is at best a relative term, and to employ it in a pleading is merely to state a legal conclusion. A mere momentary or temporary absence of the Hot Springs Railroad agent from his office, clearly could not be treated as breach of an implied undertaking to afford plaintiff a reasonable opportunity to identify himself, and secure the evidence of his right to return carriage. We have no method of ascertaining the plaintiff's standard of reasonable time.

In any event the petition fails to show facts which would justify the failure of the plaintiff to comply with the requirements of his contract during the considerable time available to him for that purpose. In no view does the petition show a state of facts which would justify the plaintiff in disregarding the condition.

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APPENDIX.

Extracts from adjudged cases.

In the case of Hall vs. Memphis & Charleston R. R. Co., 15 Fed. Rep., 57, the plaintiff had purchased for himself and two others a ticket at reduced rates from the defendant's agent, from Tom Creek, a station on the defendant's road, to Memphis and return, the ticket specifying that it was not good after thirty days. Returning after the limitation had expired, the conductor on defendant's train refused to receive the ticket, demanding train fare. The plaintiff explained that he had purchased the tickets as unlimited tickets and had been assured by the ticket agent that notwithstanding the limitation, his party could be carried on them at any time. The conductor refused to accept these explanations, and the plaintiff's party, upon continued refusal to pay fare, was expelled from the train.

HAMMOND, J., said: "Admit that the company should have carried this plaintiff notwithstanding the expiration of the limited ticket, and notwithstanding the regulations forbidding the conductor to recognize the ticket after it had expired, and it does not follow that the plaintiff is entitled to recover damages for the injuries, real or imaginary, to his person or his feelings for his *ejection* from the train. He may be entitled to the damages for a breach of the contract, which he has by the judgment received; and if, by the delay or refusal to carry him, he has suffered in his business or been put to expense, these might have been added * * * It is not the case of a man with a clear right and a clean ticket entitled to ride on that trip and train wrongfully ejected, but of one with a disputed right, a ticket void on its face, and which required further attention from the passenger to make it available, as he was informed then and there by the

conductor. Under such circumstances, to insist on the conductor taking his word about what he had been told by the station agents as to the capacity of the ticket to take him along after its plain terms had stamped it with uselessness, rather than pay the fare demanded, was his own folly; and this was the cause of his ejection and his damage, and it was not the proximate or remote result of a breach of the contract. * * * It is in my judgment the duty of the passenger to see to it before he takes a train that his ticket will carry him on that train, and where it is on its face expired he should have it renewed or otherwise made good at the proper place, and by inquiry before taking the train be sure that it is a proper thing for him to take that train. The business could not be done with tickets on any other principle."

In the case of Sheldon vs. L. S. & M. S. R. R. Co., 29 Ohio St., 214, the plaintiff was the owner of a commutation ticket entitling him and his son to twenty rides between Vermilion and Cleveland, points on the defendant's road. On the occasion of one of his trips the conductor took up his ticket, canceled the ride, and refused to return the ticket to the plaintiff but returned it to the general agent of the defendant, of which he notified the plaintiff. In the afternoon of the same day, the plaintiff not having recovered the commutation ticket nor having provided himself with a ticket, entered the defendant's cars to return to Vermilion, and upon refusal to pay fare was put off the train at an intermediate station.

THE COURT, REX, J., said: "The removal of the plaintiff from the cars by the conductor of the afternoon train for refusing on demand to produce a ticket or pay fare for his passage from Cleveland to Vermilion was, under the rules of the defendant, a proper exercise by the conductor of the rights of the defendant, and for which, when exercised in such manner as to do no unnecessary injury to the person removed, the defendant is not liable in damages."

The case of Chicago, &c.. R. R. Co. vs. Griffin, 68 Ill., 499, was this: The plaintiff had requested from

the ticket agent a ticket from Mendota to Earl, and had paid the price of that ticket, but by mistake, the ticket read to an intermediate station called Meriden. Before reaching Meriden the conductor took up the plaintiff's ticket. The plaintiff refused to pay fare beyond Meriden upon the ground that he had paid for a ticket to Earl and that his ticket read to that place. Upon his continued refusal to pay fare he was removed from the train.

The Court, SCOTT, J., said: "The evidence tends to prove the mistake occurred at Mendota, through the inadvertence of the ticket agent in giving out the wrong ticket. If so, the conductor was right in demanding fare a second time. He was not bound to rely upon the statements of appellee that he had paid his fare to the station to which he desired to be carried. It was the duty of appellee to pay the fare demanded, and if the company refused to make suitable reparation for the indignity to which he had been exposed in being compelled to repay his fare he could maintain an appropriate action. The conductor must necessarily have the supervision and control of the train, otherwise there would be no protection to the lives or comfort of the public travel."

In the case of Townsend vs. N. Y. C. & H. R. R. R. Co., 56 N. Y., 295, the Court, per GROVER, J., said:

"The jury, by their verdict, have found that the plaintiff purchased a ticket at the station at Sing Sing, for Rhinebeck; that with this ticket he went on board a train from New York, going no farther north than Poughkeepsie; that after this train passed Peekskill the conductor called for tickets and the plaintiff handed his to him, which he took and retained, giving to the plaintiff no check or other evidence showing any right to a passage upon any train of the defendant; nor did the plaintiff ask for a return of his ticket or for any such evidence. Upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited at the station until another train arrived from New York, which was going to Albany, stopping at Rhinebeck. The plaintiff got into and seated himself in a car in this train; and after it started the conductor called upon him for his ticket; in reply to which

the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had taken and not given back to him; some of the passengers told the conductor that the plaintiff had had such a ticket. The conductor told the plaintiff that it was his duty, in case he had no ticket to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff still refusing to pay fare or to leave the train upon request, was taken hold of and such force used as was necessary to overcome his resistance, and ejected from the car. This was the injury for which the recovery was had. * * * But there is another important question in the case which will necessarily arise upon a retrial, and which was raised by an exception taken upon the trial already had. That is whether the plaintiff had a right to go upon another train and use force to retain a seat there—refusing to pay fare, having no evidence of any right to a passage, by reason of the conductor of the other train having wrongfully taken and retained his ticket. * * * Surely, a regulation requiring passengers either to present evidence to the conductor of a right to a seat, when reasonably required so to do, or to pay fare, is reasonable; and for noncompliance therewith such passenger may be excluded from the car. The question in this case is whether a wrongful taking of a ticket from a passenger by the conductor of one train exonerates him from compliance with the regulation in another train on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. For the wrongful act in taking his ticket he has a complete remedy against the company. The conductor of the train, upon which he was, was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor of the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as

was rightly held by the trial Judge, by putting the plaintiff off, in case he persistently refused to pay fare."

In Yorton vs. M., L. S. & W. Ry. Co., 6 Am. and Eng. R. R. Cases, 322, the plaintiff had purchased a ticket at Marion for transportation over the defendant's road to Oshkosh, and took the train at the former place. He asked the conductor for a stop-over ticket for Clintonville, an intermediate station, and through the fault or mistake of the conductor he received a trip or train ticket instead of the stop-over ticket, which he had asked for and which the conductor undertook to give him. The next morning, when he took another train at Clintonville, in charge of another conductor, and was asked for his ticket, he presented the check received from the conductor of the other train. The second conductor told him that he could not ride on his train on that check; that it was good only with Sherman (the first conductor), and that he must either pay the fare to Oshkosh or leave the train. Upon his refusal to pay fare he was removed from the train.

COLE, C. J., said: "So here, the plaintiff was not entitled upon anything he showed the second conductor to ride on his train. That conductor, therefore, had the lawful right to eject him from it; nay, he was bound to do so, in obedience to the reasonable rules of the company, which required a passenger to obtain from his conductor a stop-over check when he desired to stop before reaching the place to which he had purchased a ticket; and the mistake or fault of the conductor in not giving him, on request, such a ticket, would not give him a lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor. * * * Putting the plaintiff off the train, then, at Bear Creek station, was not an unlawful act. It was what the second conductor was bound to do in the discharge of his duty to the company. It is true, as a consequence of being ejected at that place, at that time in the night, he contracted a violent cold and became sick. But this exposure he really brought upon himself by his own conduct. Why, then, should he complain about it? He was distinctly told at Clintonville he could not

ride on the train unless he paid his fare. He had an ample opportunity to leave the train at that place, but he persistenly refused either to leave the train or pay his fare, preferring to take his chances upon being put off at some subsequent station. He was told by the conductor he would be put off at the next station unless he paid his fare. He might not have been familiar with the surroundings at Bear Creek station, but he certainly knew he would be put off, probably in the night time. The weather was cold, and he was liable to be exposed on leaving the train. All these things he knew, or should have known, but he chose to remain on the train and abide the consequences. Under the circumstances he ought not to recover damages for any exposure or sickness which he brought upon himself by his own foolish and perverse conduct. For, as we have said, he was not entitled to a passage on that train, and was rightfully removed therefrom."

In Louisville & Nashville R. R. Co. vs. Fleming, 18 Am. and Eng. R. R. Cases, 347, 358, COOPER, J., said: "And the conductor cannot be required, by the production of testimony, to make annexations to a rule which gives him no discretion. He is not clothed with any authority to hear evidence or to determine its weight at the peril of the company, nor to occupy his time in such an investigation. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. 'The company,' says DENIO, C. J., in the Hubbard case, 'had a test far more convenient to all concerned than the taking of testimony, to wit, the exhibition of their own ticket.'"

In *Bradshaw vs. South Boston R. R. Co.*, 135 Mass., 407 (*ante*, p. 8), the Court said:

"The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statement of others as to the fact. The conductor has other duties to per-

form, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it in the first instance that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question as best he can while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law and perhaps to substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public and deprive them of the facilities of transfer from one line to another, which they now enjoy."

For further illustrations of the doctrine see the following cases, which we do not reproduce in abstract, as this brief is already too extended :

Downs vs. N. Y., N. H. & H. R. R. Co., 36 Conn., 287.
Petrie vs. Pa. R. R. Co., 42 N. J. L., 449.
McClure vs. R. R. Co., 34 Md., 232.
Jerome vs. Smith, 48 Vt., 230.

Dietrich vs. Pa. R. R., 71 Pa. St., 432.
Johnson vs. Concord, &c. R. R. Co., 46 N. H., 213.
Breen vs. Tex. & Pac. Ry. Co., 50 Tex., 43.
Crawford vs. C., H. & D. R. R. Co., 26 O. St., 580.
Beebe vs. Ayers, 28 Barb., 275.

See next page.

REPLY TO BRIEF FOR PLAINTIFF IN ERROR.

The Agent of the Hot Springs Railroad was not the Agent of the Defendant.

It may be stated to be the settled law in this country that where a railway company sells a coupon ticket covering a passage over lines beyond the terminus of its own line, the company selling the ticket is responsible only for loss or damage occurring upon its own line, and for default of its own agents.

In the case of *Auerbach vs. N. Y., C. H. R. R. R. Co.* (89 N. Y., 281): The plaintiff had purchased of the Ohio and Mississippi Railway Company a ticket for passage from St. Louis, over the several railroads mentioned in the coupons annexed, to the City of New York. The ticket specified that it was "good for one continuous passage to point named on coupon attached," and that in selling the ticket for passage over other roads, the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line. In this case the ticket was an ordinary through passage coupon ticket, the contract being completed by the acceptance of the ticket by the purchaser (and not by the additional act of signing, as in the present case). Construing the obligations and liabilities of one of the companies over whose lines the ticket read, the Court, by EARL, J., said:

"The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company, through the agent selling the ticket, made a contract for a pas-

sage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket,"

It is enough to say that the language of the Court of Appeals of New York, as quoted in the above cases, announces the doctrine as it has been declared by the text writers and Courts of this country with practical uniformity.

See also

2 Redfield on the Law of Railways (6th Ed.), pp. 313 *et seq.*
2 Wood's Railway Law, pp. 1417 *et seq.*
Penna. R. R. Co. vs. Connell, 18 Am. & Eng. R. R. Co. Cases, 339.
Nashville, &c., R. R. Co. vs. Sprayberry, 9 Heisk, 352.
Hood vs. N. Y., &c., R. R. Co., 22 Conn., 1.
Knight vs. Portland, &c., R. R. Co., 56 Me., 235.
Hartan vs. Eastern R. R. Co., 144 Mass., 44.
Chicago & R. R. I. Co. vs. Fahey, 52 Ill., 81.
Pa. R. R. Co. vs. Schwartzenberger, 45 Pa. St., 208.

The plaintiff in error had not only accepted, but had *signed*, a contract which provided that the defendant "*acts only as agent, and is not responsible beyond its own line*," and yet without even joining the Hot Springs Railroad, he undertakes to hold the defendant responsible for an alleged default of the agent of the Hot Springs Railroad—an agent not employed by or accountable to the defendant, and over whose actions the defendant had no control.

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WINSLOW S. PIERCE, JR.,
For Defendant in Error.